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THE CAUSE OF ACTION UNDER THE WARSAW CONVENTION

PART I

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"The Warsaw Convention established, whether one might wish it or not, the rule of contractual liability of the carrier . . ."—Per E. Georgiades, writing in the Revue Française de Droit Aerien.[1]

* * *

"The Warsaw Convention does not change the basic rule that the contract of carriage is not the gravamen of the action for wrongful death . . . The cause of action is created by the lex loci."—Per Judge Leibell in Komlos v. Compagnie Nationale Air France.[2]

THESE two excerpts vividly point up the contradictory interpretations of the basic philosophy of the Warsaw Convention as between certain United States courts on the one hand and French legal thought on the other. While the contest is primarily one of legal philosophy, since in most cases there will be an underlying right of action in tort upon which a plaintiff may recover, the contest is not entirely a sterile one.

If the Convention does not establish a cause of action upon which suit may be brought within the United States in accordance with the terms of the treaty, the next of kin of a passenger killed in an aircraft accident abroad will have to establish his right to recover on the basis of the law of that foreign country. This is so because of the normal rule of conflict of laws that actions in tort are governed by the law of the place where the tort occurs.[3]

Thus the personal representative of a person killed in a foreign accident would be required to show first that the law of the foreign country granted a right of recovery for wrongful death, the persons to whom such right was granted, and the circumstances under which it was allowed. While under both the Georgiades and Leibell views, a reversal of the burden of proof would be available to the plaintiff, the Leibell view could be substantially limiting, in case the foreign cause of action for wrongful death carried a limitation of liability lower than that of the Convention.[4] Moreover, if there should now exist no cause of action for wrongful death in some foreign countries, the representative or next of kin would be left without remedy if death occurred in such a land.

[1] Quelques Réflexions sur L'Affrètement des Aéronefs et le Projet de Convention de Tokyo, Revue Française de Droit Aerien. No. 2, 1959.
[2] 111 F. Supp. 393, 401 (S.D. N.Y. 1952).
[3] Masci v. Young, 289 U.S. 253; 53 Supp. 599 (1933).
[4] See Barnes v. Union Pacific Railroad Company, 139 F. Supp. 198, (D. C. Idaho, 1956).

The resolution of this question becomes important at the present time because the Hague amendments to the Warsaw Convention consisting of a protocol increasing the limits of liability and making other modifications in the convention has now been submitted to the Senate for action looking toward ratification. The protocol substantially improves the Convention but the doubt in the United States whether the Convention accords a cause of action for wrongful death leaves litigants and particularly plaintiffs with less than the full measure of rights the Convention was designed to give.

It is not the purpose of this article either to defend or attack the Warsaw Convention. However, the author is convinced that the draftsmen of the Convention intended to create a right of action based on the contract of carriage; that the draftsmen did in fact carry this intention out in the Convention as signed; that it is self-executing; and therefore the supreme law of the land today. In light of the circumstances it is believed useful to lay these elements out in plain view.

Collaterally involved in this discussion is the effect of such a cause of action in the United States.

At the present writing there are two basic cases in the Court of Appeals for the Second Circuit which have adopted the view of Judge Leibell.[5] In each of these cases the Court held that a cause of action was not created by the Warsaw Convention. In view of the important effect which these cases might have on future decisions, notwithstanding the original intent of the Warsaw draftsmen, it is desirable to examine them at close range.

Consequently, this article is arranged in two parts. The first, appearing in this issue, deals with the background, preliminary conferences, drafting and debate at the Warsaw conference concerning this Convention. The second, to be published in the next issue, will be directed to a study of the United States cases involved.

Background of the Convention

Prior to the meeting in Warsaw in the fall of 1929 eight different drafts dealing with the subject matter of the final convention had been considered by international groups. Mr. De Vos, the reporter, describes the history of the drafting of these documents as follows:[6]

> "This draft is the end result of a number of preparatory studies which have found expression in eight earlier drafts concerning either the liability of the carrier or the air waybill."
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> "A first rough draft of convention fixing the basis of liability of the carrier and of the limitation of that liability in the matter of air transport was presented by the French Government to an international conference held in Paris, October 26, 1925."
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> "This conference created a commission, which reviewed the text. An amended first draft was submitted to the conference November 3, 1925, and modifications were made in it by the Conference on November 6, 1925."
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> "A first initial draft on the air waybill was submitted to the second commission of Citeja,[7] which had been created in the meantime, meeting in Paris on March 30, 1927."
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> "As a result of the study of this draft in April of 1927 by the Citeja, the text was slightly amended."
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> "However, Citeja having during the course of this same meeting decided to examine the possibility of combining the two matters in a single

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[5] Komlos v. Compagnie Nationale Air France, 209 F. 2d 436 (1953); Noel v. Linea Aeropostal Venezolana, 247 F. 2d 677 (1957).

[6] Minutes and Documents, Second International Conference on Private Air Law, October 4-12, 1929, Warsaw, p. 159. Throughout this article any reference to either the Warsaw Conference documents or the Citeja documents is to the French text. The quotations in English from these documents are the author's translation.

[7] Comite International Technique d'Experts Juridiques Aeriens.

convention—liability and documents of carriage—a new draft was submitted in June of 1927."

"The text of this last draft was modified as a result of the deliberations of the second commission of Citeja meeting in Brussels November 7-10, 1927."

"A further meeting of this commission was held in Paris on March 21 and 22, 1928, during the course of which the earlier drafts were again amended."

"Finally, all these came before the Citeja in May of 1928 at Madrid where they were put into final form."

The reporter continues by describing the limited character of the Convention, and so doing he repeats the basic principles to which the draftsmen had directed their attention in the preparation of the first eight drafts. The reporter says:[8]

"Before turning to the articles of the draft convention, it is proper to bring out that in this matter international understanding may be established only if it is limited to certain fixed areas. Thus the text applies single-mindedly to the contract of carriage—first in its outward manifestations of form and then in the legal ties which are established between the carrier and the persons carried or who ship. It does not regulate any other question which might be raised by engaging in the carriage."

"Thus the convention creates no system of compulsory insurance."

"Similarly, liability being limited from the point of view of the carrier, the principle of abandonment is not raised."

"As it involves *liability arising by reason of specific contracts* of carriage, the convention very evidently will apply only to damage caused by the equipment used in such carriage in the performance of the contract." (emphasis added)

It is quite apparent from the foregoing that the reporter believed that the draft convention dealt with the contractual liability of the carrier and was basically limited to such liability. Was he justified in this belief?

He was. But to prove it, it is well to go over the background and development of the draft. The convention originated through the efforts of the government of France by convening an international conference on the subject and presenting to it a draft convention for consideration. It is therefore appropriate to start with the law of France regarding the liability of French carriers in 1925—the time when the international conference was called.

French Law of Carrier Liability

According to Juglart, prior to 1911 the law of France, with regard to the liability of common carriers for death, was based on tort. This liability was founded on Articles 1382 and 1383 of the French Civil Code. However, beginning in 1911 French jurisprudence took a radical swing in direction and held that a public carrier was liable in the case of death or personal injuries to a passenger on an undertaking in the contract to carry safely, and the tort in effect disappeared. What he said about it follows:[9]

"In times past the contract of carriage of persons dealt only with the means of locomotion, the price, the space to be occupied by the traveler, and where necessary with the duration of carriage. But suppose an accident occurred to the traveler. Under such circumstances the latter had to prove the negligence of the carrier on the basis of Articles 1382 and 1383—because he was in the field of tort. Now, since 1911 we have passed from the tort field to the contractual field. The law decided that from the carriage of persons there arose against the carrier a contractual duty to achieve performance. It held that a carrier undertakes to deliver the passenger safe and sound at the place of destination. Here is an example of extension of obligation which we can happily point to in studying the expression of consent in contracts. Thereafter and since 1911 whenever an accident occurred to travelers in the course of carriage, the carrier found

[8] Warsaw Minutes and Documents, p. 160.

[9] Michel de Juglart Traite Elementaire de Droit Aerien (1952) p. 240.

himself liable no longer tortiously but contractually. Negligence is no longer tortious harm but a contractual breach. As a consequence the victim no longer need prove negligence."

This doctrine—so singular to the eyes of the common lawyer—was not confined to France. Thus Rigalt in his *Principios de Derecho Aereo*[10] says at page 124:

"Contractual liability is founded in the non-performance of the obligations flowing from the contract of air transport in which third persons have or possess the status of simple contracting parties and the carrier undertakes to carry the passengers or merchandise with absolute security throughout the journey. Such obligation even without being specifically stipulated subsists, and in case of non-performance places the carrier in the role of a contractual debtor and the passenger as his creditor."

In Chile likewise liability of the carrier is based on the contract of carriage as Eduardo Hamilton says in his *Manual de Derecho Aereo:*[11]

"Liability of the carrier is born in the contract of carriage and the obligations which flow from it and may be summarized as follows: to carry the passenger free of damage and within the terms and times stipulated."

Paris Conference of 1925

The French draft was considered by the full conference after it had been revised by a commission. The reporter, Mr. Pittard, explained the reasons for the system of liability adopted as follows:

"What can one require of air transport? A proper organization of its business, a judicious choice of its staff, a constant surveillance of its servants and agents and a business-like supervision of its aircraft, accessories and prime materials."

"It is certainly necessary to recognize that he who uses an aircraft is not unaware of the risks inherent in this mode of travel, which has not yet attained the point of perfection which a hundred years have given to the railroads.

"It is therefore fair not to impose on the carrier an absolute liability but to relieve him of all liability whenever he has taken reasonable and normal measures to avoid damage—it is the diligence that one can require from a good family father."

The foregoing excerpts show that the reporter gave basic consideration to the system of liability which the convention was to impose on the carriers. Imposition of absolute liability would be unfair, and the decision was here taken, which was to be reflected in the convention as signed, that where harm is caused, liability would flow if the carrier failed to show he had exercised the diligence that a good father exercises in respect of his family.

Consideration by C.I.T.E.J.A. (Second Session)

Citeja did not immediately begin consideration of the draft convention on liability of the carrier. Instead, it first took up the related matter of the air waybill. A draft convention on this subject was discussed by the full committee in its second session, held in Paris beginning April 4, 1927.

The discussions directed to the air waybill do not concern the issue here in question. However, the point was raised during the debate of the possibility of combining the air waybill draft with the liability draft. Both subjects were assigned to Citeja's Second Commission; the reporter—Mr. De Vos—was the same for both drafts, and the Committee directed the Second Commission to come up with a consolidated draft.[12]

At this point Mr. Ambrosini, who was the reporter for the Third

[10] Antonio Francoz Rigalt, San Luis Potosi, Mexico, 1939 (Translation G.N.C.).
[11] Santiago, Chile, 1950, p. 449. (Translation G.N.C.)
[12] Citeja, Minutes and Documents, 2nd Session, April 1927, p. 40.

Commission (charged with studying third party liability matters) moved that his commission be included. The debate which followed shows the thinking of the Citeja members:[13]

> "Mr. Pittard was not in favor of this amendment. He was aware that in Italy the same system is in force respecting third party liability as for carrier-passenger liability—such undoubtedly is the reason for the Italian experts' proposing the same basis for both liabilities. If we envisage the possibility of having a system of absolute liability for third persons on the surface and one based on negligence for passengers, the question becomes divided. The basic question which arises here is to know whether to take as the basis of liability toward third persons the system of risk (absolute liability) and for the passengers the system of negligence; or to provide the system of risk in the two cases or the system of negligence in the two cases.
>
> "Mr. Ambrosini (Italy) agreed that it might be well to adopt the principle of absolute liability for passengers and goods carried and to adopt the principle of absolute liability for damage to third persons. But what matters is that all questions relating to liability be regulated in a uniform way so that insurance covering air transport may be made the subject of practical rules, and it is for this reason he recommended consultation between the two Commissions.
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> "Mr. Wolterbeeck Muller (Netherlands) in his capacity as President of the Third Commission, believed it was necessary to proceed gradually. The work had been begun with the liability of the carrier, that is to say, contractual liability; the Third Commission is now discussing liability in tort, which is a separate question. It thus appeared to him to be preferable to take one step at a time."

The Reporters' Combined Draft

The draft combining the texts of the two draft conventions was prepared by Mr. De Vos and was considered by two successive meetings of the Second Commission. The combined draft was then submitted to the third session of Citeja, meeting in Madrid in May of 1928.

The draft convention was arranged in three chapters: the first dealt with definitions and objectives of the convention; the second with documents of carriage; and the third with liability of the carrier.

It is the liability articles which most concern us, and because of the importance of this initial draft both in the respects in which it remained unchanged as well as the respects in which it was either changed, modified, or provisions deleted, it is desirable to set this chapter forth in full. Translated it reads as follows:

CHAPTER III.

LIABILITY OF THE CARRIER

ARTICLE 21

The period of carriage within the meaning of this convention extends from the moment travelers, goods, or baggage enter the airport of departure until the moment they leave the airport of destination; the period does not cover any transportation whatsoever outside the limits of the airport other than by aircraft.

If loss, damage, or delay occurs during the course of any carriage as to which only a part is governed by this convention, such loss, damage, or delay shall be presumed, subject to rebuttal, to have occurred during such part of the carriage.

ARTICLE 22

The carrier shall be liable for damage during the carriage:

(a) In case of death, wounding or other physical bodily injury of every description suffered by a traveler;

(b) In case of destruction, loss or damage to goods or baggage;

(c) In case of delay suffered by a traveler, by goods, or by baggage.

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[13] *Id.*, pp. 40, 41.

ARTICLE 23

The carrier shall not be liable if he proves that he and his employees have taken reasonable measures to avoid the damage or that it was impossible for him to take them, unless the damage arises from a latent defect in the aircraft.

ARTICLE 24

The carrier shall be liable for the errors and omissions of his servants and agents. Nevertheless, in case of an error in piloting, of aircraft handling, or of navigation the carrier shall not be liable if he submits the proof required in the preceding article.

ARTICLE 25

The liability of the carrier shall be limited to the sum of 25,000 francs per passenger. Nevertheless, by special agreement with the carrier, the traveler may fix a higher limit of liability.

In the carriage of goods, as well as in the carriage of baggage, liability of the carrier shall be limited to the sum of 100 francs per kilogram subject to a special declaration of interest in delivery made by the shipper at the time of handing over the parcel to the carrier and subject to the payment of a supplementary charge if required. In such case, the carrier shall be held to pay the declared sum, unless he shall prove that such sum is higher than the real value at point of destination or higher than the interest which the shipper has in its delivery.

The values set forth above are based on the gold standard. They may be converted into any national currency in round figures.

ARTICLE 26

In case of accident, loss, damage or delay, the liability action may not be brought against the carrier except on the basis of this convention, unless the damage arises through an intentional unlawful act as to which he bears the liability; in such case, he shall not have the right to avail himself of the provisions of this convention which exclude in whole or in part his direct liability or that derived from the errors or omissions of his servants or agents.

ARTICLE 27

In case of death of the person holding the cause of action, every liability action, however founded may be exercised, within the terms and limits provided by this convention, by those persons to whom such action belongs in accordance with the national law of the deceased or, in default of such law, in accordance with the law of the place of his last permanent residence.

ARTICLE 28

Every clause tending to exonerate the carrier from his liability or establishing a lower limit than that which is fixed in this convention shall be null, void and of no effect, but the nullity of any such clause shall not carry with it the nullity of the contract which remains subject to the provisions of this convention.

ARTICLE 29

The liability action shall be brought at the option of the plaintiff in one of the contracting states either before the court of the principal place of business of the operator or of the place where the latter maintains an establishment through which the contract was made, or before the court of the place of destination or, in case of non-arrival of the aircraft, of the place of the accident.

In case of death, every action shall be brought before the first court which shall have been properly seized of the case, and the judgment rendered shall be *res adjudicata* in every contracting state.

Procedure shall be governed by the law of the forum; however no special formality or bond may be required of a plaintiff by reason of his nationality.

ARTICLE 30

When the consignee takes the goods away without protest, such taking shall constitute a rebuttable presumption that the goods have been delivered in good condition and in conformity with the document of carriage. However in the case of non-apparent damage or of delay, the consignee shall have seven days beginning with the receipt of the goods to protest to the carrier or to his agent at the place of delivery.

Every protest shall be made by an express reservation on the document of carriage or by another writing sent within seven days of the receipt of the goods.

ARTICLE 31

The liability action shall be brought within two years beginning from the arrival at destination or from the stopping of the aircraft. The method of calculating the period of limitation as well as the causes of suspension or interruption of the period shall be determined by the law of the forum.

ARTICLE 32

In the case of carriage governed by the definition of the last paragraph of Article 1, to be performed by several successive carriers, each carrier accepting passengers, cargo or baggage, shall be subject to the rules established by this convention and shall be considered to be one of the contracting parties to the contract of carriage, to the extent that such contract deals with the portion of the carriage performed under his supervision.

In the case of transportation of this nature, the passenger or the persons claiming through him shall not take action except against the carrier having performed the carriage in the course of which the accident occurred, except in a case where by express agreement, the first carrier assumes liability for the entire journey.

As regards cargo or baggage, the shipper shall have recourse against the first carrier and the consignee who is entitled to delivery against the last carrier and further each shall be entitled to take action against the carrier performing the carriage in the course of which the loss, damage or delay occurred. These carriers shall be jointly and severally liable to the consignor and the consignee.

ARTICLE 33

Every clause in a contract of carriage in derogation of the rules of this convention and all special agreements made prior to the occurrence of the damage shall be null and void whether such derogation is by the determination of applicable law, or by a modification of rules of jurisdiction. Nevertheless, arbitration clauses may be permitted within the limitations of this convention whenever the arbitration is to be performed in the places in which courts would have jurisdiction pursuant to Article 29, paragraph 1 above.

Even a cursory reading of this text will convince the reader that the French law of contractual liability of the carrier was intended to be the governing basis of the convention. Thus Article 21 establishes the period during which the convention is to apply.

Article 22 imposes liability on the carrier in certain specified cases including death of a passenger.

Article 23 relieves the carrier of liability if he proves that he and his employees have taken reasonable measures to avoid damage or that it was impossible for him to have taken such measures. This is subject to one exception—where the damage arises through a latent defect in the aircraft. The effect of this clause is to impose absolute liability on the carrier where damage arises through a latent defect in the aircraft. While the clause was subsequently eliminated at Warsaw, for reasons which will be discussed later, it is absolute evidence that at this stage the instrument was regarded as one imposing the liability specified in the convention upon the carrier.

Article 24 imposes vicarious liability on the carrier, but at the same time relieves the carrier from such liability in case of errors in piloting, in operation of the aircraft and in navigation.

Article 25 is the limitation of liability article.

Article 26 also demonstrates that a contractual right of action under the convention was intended. The first clause of the paragraph reads—" in case of accident, loss, damage or delay, the liability action may not be instituted against the carrier except on the *basis of this convention* . . ." (Emphasis supplied). Outside rights in tort were excluded subject to one exception. This is found in the material which immediately follows in draft Article 26. Today we refer to it as the "willful misconduct" provision, which makes

inapplicable only such provisions of the Convention as exclude or limit liability. In this draft, however, it was quite clear that all claims were to be under the convention unless the damage arose from an intentional and illegal act as to which the carrier was liable. In short, actions arising out of willful misconduct of a carrier were to be based on national law rather than on the contract.

Article 27 also shows the intent of the draftsmen with respect to the basis of liability. The article provided that in case of the death of the holder of the cause of action every liability action no matter how brought could be pursued by the persons to whom such action belonged in accordance with the national law of the deceased or in default of such national law in accordance with that of the place of last permanent residence. As the minutes show:[14]

> "The reporter drew attention to the fact that in Article 27 there are two provisions. The first, in case of the death of the holder of the right (of action) every liability action shall be exercised within the terms and limitations provided by the convention—that is to say that the system of limitation of liability shall always apply whenever there is a death of the holder of the right.
>
> "The second idea is that of knowing by whom the action shall be brought.
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> "The proper means of expressing these thoughts has been sought in vain. One or two of the elements were given, but it is not possible at the present time to come to a definitive formula which is capable of dealing with the question in its entirety."

Action by Citeja at its Third Session on the Reporter's Draft

While Article 21 of the reporter's draft was modified to some extent, particularly in regard to the second paragraph, modifications made seem to have little bearing upon the instant question.

Article 22 was not changed in substance. However, during the course of the debate a question arose with respect to hand baggage and personal effects. This discussion throws considerable light upon the intention of the committee in Article 22 of the draft.[15]

> Mr. Friis (Denmark) asked if it would not be possible to deal with the question of liability regarding hand baggage and personal effects. Objects contained in hand baggage frequently are of great artistic or material value. If it were desired in every such case to eliminate liability, it would be necessary to insert in article 4 "as to which the traveler retains custody and the risk" but it seems to him that that might be a rather harsh principle.
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> The Reporter answered that it had been understood that the personal effects which the traveler retained in his custody would not come under the system of liability of the convention. The traveler has the custody and must assume the risk. The system of liability is based only on the document of carriage. Since the baggage check makes no provision for these personal goods, the system of liability does not apply.
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> Mr. Ripert. The animating spirit of the convention is the understanding that the application of the convention does not prevent a person not covered by the application of the convention from acting in accordance with national or general law. If a traveler has his clothing damaged by the negligence of the carrier, he can always prove negligence of the latter.

Subsequently, the Committee decided to insert a limitation of liability in respect of personal effects although no cause of action was given with respect to them. This is discussed under Article 25, infra.

Article 23 of the Reporter's draft was discussed by the committee together with Article 24. The draft produced by the committee combined both these articles in a new article, and changed the substance of the

[14] Minutes and Documents, Third Session of Citeja, p. 55.
[15] Minutes and Documents, Citeja, Third Session, Madrid, p. 46.

carrier's exoneration from liability (in case of pilot error, etc.) to confine such exception to damage occurring to goods and baggage. This was done on motion of the German delegation, which considered that there would be no effective balance in the Convention if an injured passenger or his representative were precluded from suing because the damage arose from errors in piloting, handling or navigation. In the course of the debate the Hungarian representative said:[16]

> "Mr. de Szent Istvany (Hungary) seconded the proposal of the German Delegation, and drew attention to the fact that under the laws of certain countries, the system of liability for air carriers is based on absolute liability. For this reason, and for the purpose of making adherence to the Convention by these states easier, the Hungarian expert believed it preferable to increase, to the greatest possible extent, the liability of the carriers —at least so far as passengers are concerned."

It will be noted that the committee retained the provision with respect to latent defects in the aircraft and the absolute liability of the carrier for them, although not without considerable debate.[17] This discussion was subsequently renewed at Warsaw and the phrase was there eliminated. Consequently, there is no need to set forth the full discussion here. However, the final speech, by the Reporter, is interesting:[18]

> "The reporter shares the opinion of Mr. Pittard. It is certain that the convention contemplates complete liability. It was only last year at the request of the Italian delegation, that this system had been changed and that by a rather small majority. The big argument put forward is that which was stated by Mr. Pittard: it's the right of recourse (of carrier against manufacturer). There is one person who is liable—that is the manufacturer, but the traveler is never in a position to sue the manufacturer, it is therefore necessary that it be the carrier. It was before this practical argument of fairness that the commission bowed and accepted this exception to the theory of negligence."

Article 25 was amended in only one particular. That related to inserting a limitation of liability on objects which the passenger keeps in his own custody and came about as follows:[19]

> "The reporter made an observation regarding the special rules requested by the British delegation in regard to personal objects which have not been registered with the carrier and which have real value.
>
> "Mr. Clarke recalled what he had said earlier. When the traveler registers his baggage there is a known situation. Outside of that, there are personal effects and belongings the possible loss of which it would be appropriate to subject to the rules of the Convention, prohibiting recovery under this heading in a greater amount than a given figure. It did not appear necessary to declare these objects, because the burden of proof falling on the traveler, and the liability being limited, the carrier would always know the extent of his risk.
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> "The chairman before requesting the committee whether it was agreed on the substance and whether there was occasion to return the matter to the drafting committee requested what the maximum limit would be for these personal objects.
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> "Mr. Babinski proposed as a maximum limit the amount of a thousand gold francs."

Thus a special status was created by this action of Citeja in regard to these personal objects and effects. The convention imposed no liability as to them but merely limited liability arising under national law.

During the course of its third session the Citeja began a surgical operation with regard to Articles 26 and 27 of the reporter's text which destroyed the organizational clarity of the original document. It also eliminated a

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[16] *Id.*, p. 49.
[17] Minutes and Documents, Citeja, Third Session, Madrid, 1928, pp. 50, 51.
[18] *Id.*, p. 51.
[19] *Id.*, p. 52.

phrase, which coupled with a slight mis-translation from the French to the English text is probably the basic reason for Judge Leibell's decision. In short, if the language which the Citeja excised at this moment had remained, this article might never have been written. I refer, of course, to the phrase "the liability action shall not be brought against the carrier except on the basis of this convention . . ."

The reason for the surgery is explained by the reporter:[20]

> "The reporter explained: Former Article 26 contained two ideas— first, every liability action must be brought on the basis of the convention; the second idea covered the intentional unlawful acts as to which the carrier had assumed liability. It appeared absolutely necessary to separate these two ideas. There were thus two new paragraphs. In addition, since there had been eliminated from Article 27 the part relating to the person who would be entitled to bring suit on the death of the holder of the right, the article no longer contained more than a declaration that all action must be brought on the basis of the convention. This was a repetition of the same idea contained in Article 26. The drafting subcommittee had therefore combined the two articles in a new Article 24 which is drafted thus:
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> "In the cases provided in Article 21, even in case of the death of the interested person, every liability action however founded may not be exercised except with the terms[21] and limits provided by this convention.
>
> "If the damage arises from an intentional unlawful act as to which the carrier is liable, he shall not have the right to avail himself of provisions of this convention which exclude in whole or in part his direct liability or that derived through the errors of his servants or agents."

The earlier floor debate on Article 26 shows the considerations which the draftsmen gave to the effect of the article. The following colloquy took place:[22]

> "Mr. Richter. Article 26 (of the Reporter's draft) says in short that the action shall be based either on the convention or on national law and the injured person will choose which is the better for him. For an action under national law, it is the victim who must prove negligence and this sometimes is quite difficult. The victim will say in such a case 'I renounce receiving full reparation for my damage in order to be sure of receiving something.' "
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> There followed an exchange of views between Messrs. Ripert, Richter, Pittard, Clarke, and the chairman, and the following draft was presented:
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> "In the cases provided in Article 22, the liability action shall not be brought against the carrier except on the basis of this convention unless the damage occurs from an unlawful intentional act as to which he bears a liability."
>
> "The chairman observed that this text said in certain cases the special law arising from the convention ceases to apply and in such instances general principles of law are to be applied. The two cases must be provided for—'the liability action shall not be brought except on the basis of this convention'—and this is the first and the 'unless' clause which immediately follows forms the basis of the second.
>
> "Messrs. Clarke and Ripert observed that the initial idea had been that no action could be brought except on the basis of the convention, but that if one found an intentional unlawful act, the limit of liability would not apply. By the text just submitted every exception to the convention would be permitted. It would be enough to charge the carrier with an 'intentional unlawful' act. That might or might not succeed, but in every case it would permit the plaintiff to bother the carrier.

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[20] *Id.*, pp. 66, 67.

[21] Fr.—conditions. The English translation of this word as "conditions" in the official U.S. text of the Convention, Article 24 may be one of the reasons for Judge Leibell's decision. See 111 F. Supp. 393 at 402. Le Nouveau petit Larousse gives "conditions" several meanings, including the English legal sense. However, it also defines it as "the fundamental basis," and it is apparent that the Citeja was using it in the latter sense. Thus "terms" appears to be a better translation.

[22] *Id.*, pp. 53, 54.

"The Chairman. It would seem that the best way out would be to maintain Article 26 in the initial sense which had been given it. It would be appropriate to speak here only of the loss of the limitation of liability, without trying to explain in detail the general question of the possibility of suing by virtue of national law."

The Discussions at Warsaw

The Warsaw conference lasted eight days—from October 4 to October 12, 1929. During this time most of the discussion was directed to specific amendments to the Citeja draft. There was consequently little basic discussion of the philosophy of the convention. Moreover, such a discussion was unnecessary, since most of the active delegates present were members of Citeja and had participated in the drafting.

There is nothing to indicate any change in direction which would modify the original draft from a convention creating a complete system of liability based on the contract of carriage to one which merely imposed conditions and limitations on rights of action otherwise accorded under national law. On the contrary, the evidence is overwhelming that the conference reaffirmed the theory throughout that the convention would establish a system of liability complete in itself. This evidence is of two types. The first is the adoption of amendments to the Citeja draft which are compatible only with the complete liability system philosophy. The second is specific statements made on the floor of the conference. Statements of this nature appear during the course of debate, and are set forth in the discussion below.

In the first category come the following actions taken by the conference modifying the Citeja draft (or refusing to modify it):

1. The rejection of a Japanese proposal to permit individual states by legis'ation to lower the limitation of liability of carriers in operations subject to the convention.

2. The elimination from Article 28 of the place of accident as a possible forum for bringing suit.

3. Admitting the defense of contributory negligence of the person injured but basing its effect not on the law of the place where the accident occurred, but on the law of the forum.

4. The adoption by the conference of a limitation of liability for articles retained in the passenger's possession, but according no right of action to sue for such loss under the convention.

5. Specification of the rules of *respondeat superior* and the accompanying rejection of a British proposal that such liability be determined by reference to national law.

6. The elimination on the ground of unfairness to the operator of absolute liability provided in the earlier Citeja draft for damage arising from latent defects in the aircraft.

These items will be discussed more fully below.

The Japanese Proposal

The debate on the Japanese proposal occurred during the first stages of the conference and is reproduced at pages 24, 25 of the Warsaw documents. It is set forth in full below in translation.

"Mr. De Vos—reporter. We thus have in the first classification (of proposed amendments to the draft convention submitted by various governments) concerning the principles of the system of liability itself, a first amendment coming from the Japanese delegation which reads as follows:

"'Article 25—the Japanese delegation is of the belief that in present state of air navigation and in view of the extremely different conditions which exist in various countries in the world, it is prac-

tically impossible to apply the provisions of Article 23 (final Article 22—limits of liability) in a uniform way.'"

"'The delegation proposes therefore in order to allow consideration of specific local circumstances, to weaken the thrust of Article 25 (final Article 23) by reserving to the states the ability to authorize by legislative act a departure from this article if they believe it necessary.

"'The Japanese delegation proposes to amend as follows paragraph 1 of Article 25:—add after 'of no effect' the words 'unless it be authorized by national law adopted in view of special circumstances' and by modifying the beginning of the following sentence as follows: 'nullity of the clause specified above shall not entail . . .'

"Article 25 prohibits all clauses of exoneration from liability of any sort; the Japanese delegation would authorize each national law in the case where it judged such action necessary to depart from this article.

"The opinion of your reporter is very clear and very brief; it is absolutely impossible to accept this amendment; to do so would be to completely upset the basic principles of this draft, which is a compromise and of which one of the first principles is the interdiction of clauses of exoneration.

"The Chairman. The delegate of Japan has the floor.

"Mr. Motono (Japan). I will also be very brief. The Japanese delegation has considered at length the text of this convention and we have no intention of running counter to its basic principles; but as Mr. Giannini said, we are the representatives of governments; we are here to make a convention to which the whole world should be able to adhere, and this requires reciprocal concessions. Moreover, if we want to make any progress at all and accomplish something, I believe that we should above all take heed of considerations of a practical nature. My government believes, as you can see, that in the present state of air navigation, given the extremely different conditions that exist in the various countries, it is practically impossible to apply Article 23 in a uniform manner. This is particularly important for the non-European countries. I can well understand that for European countries a system can be adopted which is just about uniform as has indeed been done in several conventions; but if you want to include all the countries of the world such as Asia, America, Africa, and perhaps Oceania, you can establish a principle, but it is necessary to make it somewhat flexible. What we propose, therefore, is not to say to the companies 'You may do what you want,' but to make subject to national law the possibility of attenuation of liability (below the convention limits).

"Sir Alfred Dennis (Great Britain). As regards the British Government, the sole reason which it has for entering into this convention is the desire to attain uniformity. If the conference adopts the viewpoint of Japan, we would be completely defeated in this desire. The draft convention is contrary on many points to our own law and to our customs, but we have decided to make sacrifices in order to attain this uniformity of system.

"The Chairman. Does anvone else wish to speak?

"Mr. Ripert (France). What is the opinion of the reporter?

"Mr. De Vos (Reporter). He has already given it to you in a very clear but brief way.

"The Chairman. Then, gentlemen, I will put the amendment of the Japanese delegation to vote."

(The amendment was rejected by unanimous vote less one of the conference.)

The presentation and rejection of this amendment is important, since it demonstrates that the government of Japan believed it necessary in order to permit it and other countries to provide lower death limits than the Convention provided. If the cause of action for wrongful death was to be based on national law, the desired result could have been accomplished by Japan acting either unilaterally or in cooperation with the neighboring countries to which its airlines flew. The unanimous rejection (except for Japan) showed that the Conference would tolerate no such idea. The action taken shows that neither airline nor government can place a lower limit on deaths covered by the Convention than that provided in the Convention.

Elimination of the Place of Accident as a Possible Forum

Article 28 of the Warsaw Convention provides that an action for damages must be brought at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or his principle place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

This Article appeared as Article 26 of the Citeja draft, and in addition to the tribunals specified in the final convention, the draft provided: "And, where the aircraft fails to arrive, the place of the accident."

The discussion on the floor of the Conference when it was agreed to delete this last forum from those given common jurisdiction to decide questions arising out of the Convention, follows.[23]

Mr. De Vos—(Reporter)

"We now come to the matter of jurisdiction over liability actions.

"According to the British proposal, the jurisdiction of the place where the accident occurred should be eliminated. The British delegation believes that the retention of this place as one where action may be brought could bring about difficulties and give rise to actions against which the carrier might find it difficult to defend.

"We had recognized the place of the accident as a possible jurisdiction within which suit might be brought by reason of the ease with which one might there establish the circumstances of the accident."

Mr. Clarke—(Great Britain)

"We have not very much to say on this question apart from what appears in the document you have before you.

"The first point to be brought out is that the place of accident has absolutely no connection with the contract or with the place to which the parties are considered to have given jurisdiction. Ordinary contract law assigns jurisdiction to the place where the contract was made, but the place where the accident occurs may have absolutely no relation to the contract.

"The second point which concerns us is that in the course of long journeys, such as the trip from London to India, you pass through countries where courts are not at all well organized. You will have very great difficulty for example in bringing suit before the courts of Persia or Mesopotamia. The carrier also would have enormous trouble in defending a case which might be brought in these far-off countries, where the courts really are not well organized. It is for these two reasons that the British delegation proposes the deletion of the words 'or in the case of the failure of the aircraft to arrive, at the place of the accident.'"

Mr. Babinski—(Poland)

"It appears to me that the British delegation in making the proposal just explained bases it on a point of view which deals with specific cases. For us in Europe, the situation is presented a bit differently, and it would be quite difficult to eliminate the *forum loci* which appears to be an altogether natural one from the point of view of procedure in which to bring an action.

"If we consider the material elements of the accident which produce the liability action, we think at once of the place of the accident so that from the legal point of view it would be difficult not to include that place. Moreover, in the rail conventions such a tribunal is accepted.

"Furthermore, I would like to observe that the convention does not deal with matters of execution. He who would bring an action will have to assure himself whether the foreign forum gives him a means of levying execution. He will naturally choose a tribunal of a country where the judgment may be thereafter enforced in the defendant's country.

"To sum up, I believe that for reasons of general policy and for the others which I have pointed out, it would be preferable to retain the text of the Citeja draft."

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[23] Warsaw Conference Documents, pp. 77-79.

Mr. Youpis—(Greece)

"I agree with the points just raised by the delegate from Poland.

"It is difficult not to accept jurisdiction of the place of the accident. The person suffering damage, as well as the carrier himself, has a very special interest in having easy proof, and certainly proof cannot be easier than on the very spot where the accident occurred.

"Against this are raised objections that there are countries where justice is badly organized and the injured person might take advantage of this fact as a sort of blackmail. This is true, but if it is difficult for air navigation enterprises to appear in a far-off country where justice works poorly, the same difficulty confronts the injured person with even greater force. Moreover, the limitation which we have fixed for liability (25,000 francs) would not allow a person to run the risk of going to a far-off country if he knew that justice was not certain there.

"In this same Article 26 there is listed the place of destination as a jurisdiction in which the injured person may bring said recourse; but the place of destination can also be in Mesopotamia—a country where the courts don't work very well; and such being the case we are logically consistent if we maintain our present draft.

"For all these reasons I believe that the grounds advanced for opposing the text before us are invalid."

Mr. Ripert—(France)

"I wish to support the amendment which has been proposed.

"Jurisdiction in courts of the place where the accident occurred is justified when the victim is a third person, a stranger to any contract of carriage, and who has the right to be protected against the carrier. But when there is involved a shipper of goods or a traveler who has entered into a contract and who by that fact alone has placed himself under the governing rules of the convention and the law of the contract, there is no reason at all for that person to go trying his case before any old court which happens, by chance, to be the court of the place of accident. Not only is there no reason for it but it is extremely dangerous because if in the convention we say that the court of the place of accident has jurisdiction; it will not have jurisdiction unless the state where one wants to begin action has ratified the convention. Consequently, we would find ourselves in the presence of a very complicated rule. It would be necessary for the victim to know whether the state at the place of accident has ratified the convention.

"We have inserted this rule in the draft convention on third party liability (in Citeja) where there is justification for it; but for liability arising out of an accident, I believe that we must let the usual rule of contracts apply and suppress this novel rule, which is not found in any other convention."

Mr. Pittard—(Switzerland)

"I believe that we can support the amendment of the British delegation, and I am disposed to do so because up to the present time, with the exception of Mr. Youpis, only disadvantages have been shown respecting the forum of the accident.

"If an accident occurs, without any invitation being issued, the police of the place of accident will turn up on the spot. They will be concerned not with matters relating to the transportation but with those relating to the accident. With respect to the accident the question will be brought to light immediately on the very spot by the authorities of the country if it is well organized. And if it is a non-organized country all the objections of the *forum loci* are presented.

"Every time an accident occurs there is an immediate police intervention. If there are no police, what kind of courts would you have? On the other hand if there are police the facts observed by them will be carried before the courts selected by the parties in the contract. That is to say, the court of the place of departure or of arrival. For these reasons I wholeheartedly concur with the British proposal."

The Chairman—

"No one else desires the floor?

"I'll put the British proposal to vote. Vote by states has not been requested."

(The British proposal was adopted.)

The foregoing debate would have been absolutely incredible if the delegates had had the vaguest intention of recognizing the local law of the place of accident as the gravamen for wrongful death action. If such had been their intention it certainly would have been urged in argument as a reason for allowing the local court to hear the case. What forum could better apply local laws than the local court? Yet local law was nowhere mentioned.

Contributory Negligence

It will be recalled that the Citeja draft contained no reference to contributory negligence and the effect that this might have upon the liability of the carrier. This lack was noted in the comments and suggestions of the United Kingdom.[24] The proposal made by the United Kingdom was as follows:

> "Article 22.—Addition of the sentence *'liability established by Article 21* shall be avoided if the carrier proves that, notwithstanding his own negligence or that of his servants or agents, the injured person would have been able to avoid the damage by taking reasonable measures to that end.' " (emphasis added)

This amendment was first brought before the conference on the second reading of the draft.[25] The discussion amounted only to a statement by the reporter that the commission had accepted the idea as to substance and suggested referring the matter to the drafting committee. This suggestion was adopted.

The drafting committee made a separate article, incorporating it in the convention as Article 21. It was substantially revised and as revised was adopted. It now reads as follows:

ARTICLE 21

> If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier fully or partly from his liability.

While not stated in the Minutes directly, it is obvious that the British proposal, which contemplated proof of contributory negligence as a complete bar to recovery, was not acceptable to the majority of the delegates, who were used to the doctrine of comparative negligence. Thus rather than inserting a defense of contributory negligence, the effects of which were specified in the Convention, they determined that contributory negligence would be given the effects which the law of the forum might specify. It was a *renvoi* of this matter to local law.

But which local law? The general rule is that contributory negligence is a matter of substance, not procedure, and whether it constitutes a complete bar or only a matter in mitigation is determined not by the law of the forum, but by the law where the contributory negligence took effect. As Learned Hand said in *Jerrell v. New York Central R. Co.*:[26]

> "So far as the Canadian law (Section 4) apportioned damages according to the relative negligence of the parties, it went to the substance of the liability, and must be followed where suit is brought elsewhere."

What pixie-like imagination the draftsmen at Warsaw must have had, if we credit them with the intent of making local law the gravamen of the cause of action for wrongful death! By international action, dedicated to uniformity, they would have bottomed the entire right of recovery for death on the disparate laws of the countries of the world, scalped the right by

[24] Warsaw Minutes and Documents 188, 192.
[25] *Id.*, p. 112.
[26] 68 F. 2nd 856, 857 (C.C.A. 2nd 1934) cert. den. 292, U.S. 646; 54 S. Ct. 780.

imposing a uniform limitation of liability, added to the right by requiring the highest degree of care of the carrier, and finally torn the right apart by throwing the determination of a major part of its substance—the defense of contributory negligence—to the forum chosen by the plaintiff from four possibilities determined in each case by reference to the specific contract of carriage. Conceivably, they could have adopted local law as a basis and prescribed a uniform defense of contributory negligence with uniform effect —this is substantially what was done in the case of the limitation of liability for personal effects; but to scatter the substance of the right to the four winds makes absolutely no sense at all. Not even an international conference could be so demented.

The action, however, is completely consistent with a Conventional cause of action. While the solution of referring a substantive defense to such an action to the law of the forum may not be ideal, it is not dramatic nonsense. First of all, since the law governing the creation of the Conventional right has to be the law of the forum (because only courts of governments which have ratified the Convention have jurisdiction) no violence is imposed on judicial principles. Secondly, while the goal of uniformity is not attained in this respect, it is obvious that if a uniform rule had been promulgated, the Convention would not have been acceptable to one bloc or the other of the participating nations. As the Chairman of the commission that drafted the article said:[27]

> "Mr. Giannini—Chairman of the Commission—
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> "I would like to request the Conference to leave unchanged the draft article as presented by the Commission, because it is the fruit of a great deal of labor.
>
> "We encountered tremendous difficulty in finding a means of expression which would equally meet the objections of the English and Anglo Saxon peoples and the peoples of Continental law. If we were to eliminate this renvoi to the local judge, we would encounter the very great difficulty pointed out by Sir Alfred Dennis; in his law, judges do not know or understand the doctrine of comparative negligence. Contributory negligence is either a complete bar or has no effect."

Personal Effects

One of the hidden keys to a solution of the question of whether the Warsaw Convention establishes an independent cause of action is Article 22 (3). This provision reads:

> "As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger."

This innocuous provision is certainly minor in effect. It was not debated at all in the conference; and except for changing the limitation from 1,000 to 5,000 francs, is unaltered from the provision in the Citeja draft.

While it was not debated in the Conference, it was considered by the Conference in view of the fact that it formed part of the report of the reporter which was circulated in advance of the Conference and presented to the Conference itself. Speaking of this provision, the reporter says:

> "With respect to the personal effects retained in the custody of the passenger: they do not come under the system of the convention: the traveler has the custody and the risk. The system of liability of the convention is based only on the document of carriage. The baggage check not covering these objects and personal effects, the system provided (in the convention) does not apply. It is to be understood, however, that the convention does not prevent the application of general law: if a traveler's clothing is damaged by the negligence of the carrier, the passenger can

[27] Warsaw Minutes and Documents, p. 137.

> prove the latter's negligence. In such a case, special limitation of liability is provided as will hereafter be stated."

The effect of this minor provision on the instant question is out of all proportion to its significance to the Convention as a whole. The background in Citeja has been heretofore explained, and it is with respect to the liability regarding such articles that the opinion of Judge Leibell in the *Komlos*[29] case may be paraphrased:

> "Those defenses (of exoneration and limitation) are not strictly speaking defenses ex contractu. They are in fact conditions attached to the 'cause of action.' The cause of action is created by the lex loci. The conditions which are attached thereto are created by the Warsaw Convention. The gravamen of the action is the negligence of the defendant which wrongfully caused . . . (the loss or damage to the personal effects) . . . The Warsaw Convention does not change the basic rule that the contract of carriage is not the gravamen of the action . . . (for loss or damage to personal effects retained in the custody of the passenger)."

Inclusio unius est exclusio alterius.[30]

Respondeat Superior

The Citeja draft Article 22 (final Article 20 (1)) provided that "the carrier shall not be liable if he proves that he and his servants and agents have taken all reasonable measures to avoid the damage or that it was impossible for them to take such measures." This provision, coupled with Article 21 of the draft (imposing liability), formed the basis of carrier liability under the draft convention. Although the final result was liability measured by the carrier's negligence, the burden of proof was upon the carrier to establish that both he, his servants and agents took all reasonable measures to avoid the damage. This fact alone took care of the liability of the carrier's principal for his negligent agent within the limitations prescribed. It also took care of the agent who negligently failed to act, as well as the agent who wasn't there at all, when he reasonably should have been.

Significantly, the discussion failed to reflect this point, either in Citeja or at Warsaw. Where the matter of *respondeat superior* did arise was in connection with the carrier's unlimited liability. Under what circumstances should the carrier be liable without limit for the intentional unlawful acts of his agents and servants?

The Citeja draft (Article 24, second paragraph) had sidestepped this point by stating: "If the damage is caused by an intentional unlaful act *for which the carrier has liability,* the carrier shall not be entitled to avail himself, etc." Under what law of vicarious liability is this "having liability" to be tested? The British suggested that the problem should be solved by adding after the word "liability" the phrase "in accordance with the law of the country where the contract was made."[31]

This proposal caused a violent explosion. Delegates from all countries expressed horror at the thought of vicarious liability being decided by reference to the law of any state. Because it is principally a matter of color, only the last few speeches are included here:[32]

> "Mr. Clarke (Great Britain) . . . Moreover, what we say is that if the employer is to be held liable in certain cases for the acts of his employees, we must decide by what law the question will be governed. For example, English law might decide in a given case that the employer is liable, while the French law would hold to the contrary, and vice versa. We must therefore say in the Convention what is the law to be applied.

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[29] *Supra*, note 2, 111 F. Supp. 393 at 401.
[30] 11 Coke 58b.
[31] Warsaw Minutes and Documents, 188, at 193.
[32] *Id.*, p. 44.

"Consequently, we have two question to be answered: to know exactly the meaning of 'intentional unlawful act' (and we have a proposal in this respect) and then, to indicate what law shall determine whether liability is to be imposed on the employer.

"Those are the two questions to be resolved."

"Mr. Ambrosini (Italy)—"We want the convention to be applied in all cases and that is why I have proposed the expression which we adopted. Clearly, it may be possible to find something more precise but that's a question for the drafting committee. In any case, we must push aside any recourse to national law."

"Sir Alfred Dennis (Great Britain)—"We thought it necessary to find an expression which would safeguard all rights and would avoid every doubt. That is why we proposed saying that the law to be applied in such cases shall be the law of the country where the contract was entered into or such other law as you may wish, but the convention must fix the law under which the liability or non-liability of the carrier will be determined, because I believe that if you seek to find a law (in the convention) which every country will accept, it will be a very difficult matter. It is possible that we may be mistaken. We do not believe so."

"The Chairman—Does anybody else wish to speak on this question?

"Then I believe we have before us two proposals, the British proposal and the French proposal. The proposal of the French delegation as formulated by Mr. Ripert is to return the matter to the drafting committee."

"Mr. Ripert (France)—"We shall make every effort to find an expression which will be satisfactory, but it should be well understood, here and now, that we are absolutely opposed to any provision which would return the application of the matter to national law. This is the first time that national law is sought to be applied, and if we were to accept it in this instance, it would be sought for other questions. As we see it, the convention would be destroyed, if recourse to national law is established for each article. We wish to be as conciliatory as possible on the expression we adopt; we will work it over as much as possible, but I implore the delegates not to take this dangerous path which consists of reserving the solution of the litigation to national law."

It must be admitted that the final text, although adopting an international and uniform rule, leaves the trial judge much discretion, for what is regarded as within and without the "scope of employment"[33] may differ from country to country.

Liability for Latent Defects

The Citeja draft imposed absolute liability on the carrier in case the damage was caused by a latent defect in the aircraft. The theory under which this was adopted was one of "fairness" to the passenger. Predicated on the assumption that the passenger would have no rights of any kind against the manufacturer in such circumstances, Citeja counted on a right of reimbursement of the carrier from the manufacturer to even things up.

If this exception to the rule of negligence had been retained in the final Convention, there could be not the slightest doubt that the Convention, rather than the lex loci, provided the basic cause of action. However, the exception was not retained, and it becomes necessary to examine the reasons for its rejection. Obviously, if it had been rejected because it was out of harmony with the lex loci theory, the rejection would support Judge Leibell's view of the Convention.

However, the minutes are quite clear that the reason for its rejection was the result of a compromise involving also the defenses of error in piloting, handling of the aircraft or in navigation.

The scene was set by the advance submission of proposals by the delegations of Great Britain, France and the U.S.S.R. The British wanted to

[33] So in the official U.S. text of Article 25. It may be that this is slightly broader than the French—"l'exercise de ses fonctions."

eliminate the latent defect liability and extend the error in piloting defense to the carriage of persons.[34] France made similar suggestions.[35]

Russia, on the other hand, urged that errors in piloting, etc., be removed as a defense even for the carriage of goods and baggage, and said nothing about eliminating the absolute liability for latent defects.[36]

The debate is reported at pages 25-37 of the Warsaw Minutes, and is far too long to set forth here in full. However, one or two excerpts are worth recording, particularly portions of the speech made by Sir Alfred Dennis of Great Britain. What he says is important from our point of view, since the British delegation was the only representative of any common law country at the conference; England had given us the common law; it had also given us Lord Campbell's Act. Presumably Sir Alfred was well aware of the English law. Here is what he said, in part.[37]

> "This provision (carrier exoneration in case of pilot error) was adopted—specifically, at the Maritime Conference in The Hague; it was also adopted in our initial draft drawn up in 1925. But in this respect, and in others as well, since 1925 the tendency has been to impose ever heavier liability on the carrier. This is exactly what we are doing on this first point (limiting pilot error exemption to carriage of goods and baggage). By the same token we are accepting liability of the carrier in cases of latent defects in the aircraft, and, moreover, we are increasing the amount of damage recoverable under the limitation of liability. In my opinion, or rather in the opinion of my Government, it is difficult to separate these three points. We must recognize that the liability of the carrier is provided for and governed by Articles 22, 23, 24 and 25 (of the Citeja draft). I can say that the principle currently adopted by our Government is to consider that these matters should be governed by the free will of the parties. In the Convention we propose to replace the system of freedom of contract by a system of rights, rules, and by-laws. My Government believes that these rules should be of such nature that they may be incorporated in a fair and equitable contract between parties equally situated. It is in accordance with this principle, I believe that the 1924 maritime convention was agreed upon.
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> "The convention we are now considering originally contained the terms which are found in the maritime law, and it is for that reason that my Government tentatively accepted in its general lines the 1925 draft convention on carrier liability. Since then, in the course of our discussions, changes have come about which modify the general character of this draft convention as it relates to the liability of the carrier. My Government has directed me to support my amendment as forcefully as I possibly can, because in its opinion, taken as a whole, the liability which is imposed on the carrier is much too heavy.
>
> "So far as latent defects are concerned, I have very carefully looked into the matter: never, in our law, have we imposed such a liability on a carrier. In maritime law, there also has never been given an absolute guarantee of seaworthiness. The same is true in the railroad field, and not only today when railroad manufacturing is a well developed science, but even 50 years ago, in opinion after opinion our courts have held that if railroad companies had taken reasonable measures, they would not be liable."

There followed a speech by Richter (Germany) in support of the Citeja draft, a long discourse by Mr. Pittard (Switzerland) on the justification for the rule on latent defects, a declaration by Mr. Giannini (Italy) stating he could not accept the British and French proposals, a rebuttal by Mr. Ripert of France, another by Sir Alfred, and a comment by the Reporter that: "It is evident that all these questions are connected, and constitute the several parts of a whole which is the system of liability."[38]

At this point Giannini proposed that the matter be resolved by leaving

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[34] Warsaw Minutes and Documents, p. 192.
[35] *Id.*, p. 188.
[36] *Id.*, p. 210.
[37] Warsaw Minutes and Documents, p. 29.
[38] Warsaw Minutes and Documents, p. 34.

the exoneration provision unchanged, thus meeting neither the French and British nor the Russian amendment, but by striking liability for latent defect.

This was accepted by Britain and France, voted against by Russia and carried 17 to 5.[39]

Conclusion

So far as the draftsmen at Warsaw are concerned, the conclusion can be short. Nowhere, either in the minutes of the Warsaw Conference or in the minutes of Citeja, is there a scintilla of evidence that they were adopting the lex loci theory for actions based on the death of a passenger. On the contrary, it is apparent that the goal of unification was sought with unremitting zeal—that the intent was to supply that unification by a contractual right of action under which liability was not to be absolute in case of nonperformance, but measured by the negligence of the carrier.

What the conference at Warsaw decided is history. The more interesting aspect, perhaps, is what the United States common law courts have done with it, may do, and should do. If the contract right is recognized, can it exist side by side with actions for wrongful death based on the lex loci—and if the contract right is not recognized, what do our courts do with wrongful death suits based on foreign law, where the foreign law is that the action is governed by a contractual right accorded by the Convention!

These problems will be examined in the next issue.

[39] Warsaw Minutes and Documents, p. 37.

CUJUS EST SOLUM EJUS EST... QUOUSQUE TANDEM?

A contribution to the legal history of a pseudo-maxim from its illegitimate conception on the shores of the Mediterranean Sea and its meteoric appearances in Common and Civil Law to its inglorious death at the hands of the Courts in the New World.

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CHAPTER I

THE MAXIM, ITS VARIANTS AND ITS TRANSLATIONS

Not often has a legal maxim had as doubtful a birth, as arbitrary an existence and as disgraceful a death as the phrase CUJUS EST SOLUM EJUS EST USQUE AD COELUM ET AD INFEROS. In the title of this contribution it has been paraphrased to reflect its exasperating reappearances no matter how often it has been laid to rest by writers and judges so that it is opportune to use Cicero's famous words addressed to Catilina and question: "Quousque tandem?" (How much longer?) will it act as a legal crutch to landowners eager to support their actions for trespass and nuisance against users of the superincumbent air space.

But to properly reflect to-day's jurisprudence the maxim should really be paraphrased to read: CUJUS EST SOLUM EJUS EST USQUE AD "QUALEM LIMITEM SUMMITATIS"? This version would more exactly delineate the legal problem which has been a bone of contention in the courts for two-thousand years and has only partially been solved by legislation in Civil and Common Law countries during the last 150 years.

The . . . ET AD INFEROS part of the maxim has been purposely omitted from this discussion because it has had a somewhat easier life, but still deserves a separate treatise with special reference to the development of property rights to minerals and oils in the solid strata of the earth underfoot.

Although its translation should not offer to the scholar any great difficulties, the maxim as we know it to-day, is an arbitrary form and not the original gloss attributed to Accursius of Bologna[1] which read: CUJUS EST SOLUM EJUS DEBET ESSE USQUE AD COELUM in a Note to Dig. VIII.2.1 and a further difficulty arises from the form in which the phrase is quoted by Lord Coke[2] around 1628 as taken from the first recorded English case, *Bury v. Pope*[3], decided in 1586: CUJUS EST SOLUM EJUS EST SUMMITAS USQUE AD COELUM. The use of the word "summitas" in this first English case in conjunction with the phrasing of the gloss (DEBET ESSE or "ought to be" instead of the categorical EST or "is" in the first recorded decision of 1586) should have helped the learned profession in determining that the maxim had only pseudo-Roman history. An authority on Medieval Latin[4] states unequivocally that "summitas" is not found in classical Latin; its meaning is "end, extremity" and appears for

[1] See p. 242, *infra*.

[2] COKE ON LITTLETON, Lib. 1, Ch. 1, Sec. 1 or 4a.

[3] Cro. Eliz., or 1 Cro., 118 (Croke's Engl. K. B. Reports tempore Eliz.), 1586. 78 Eng. Rep. 375 (Moak's E.R.), 1587.

[4] BAXTER & JOHNSON, MEDIEVAL LATIN WORD-LIST 411 (1934).

the first time in 720 and, again, about 860 and thus supports the now general agreement that the language of the maxim was not part of Roman written Law; while it may have partly been conceived with principles of Roman Law in mind, it is stated in a non-Roman manner.[5] Sohm[6] asserts that the Roman Law did not know "extravagant statements of private property. It always reconciled fixed rules with equitable discretion."[7] Yet, since Lord Coke, and *Bury v. Pope* before him, the maxim has been reduced to the now common phrasing of CUJUS EST SOLUM EJUS EST USQUE AD COELUM which has been translated as "He who owns the soil owns everything above (and below), from heaven (to hell)"[8] or "Whose is the soil, his it is up to the sky"[9] or "He who possesses the land possesses also that which is above it"[10] or "He who has a right to the soil has a right even to the sky"[11] or "Whose is the land, his is also what is above (and below) it."[12] How closely related the maxim is to the Law of Torts is pointed out by Jackson[13] citing its connection, to some extent, with the phrase SIC UTERE TUO UT ALIENUM NON LAEDAS, a landmark in the law of trespass and nuisance on the ground.

CHAPTER II

ITS PSEUDO-ROMAN HISTORY

By its own nature, our maxim is intimately connected with air rights, and their invasion. Air rights can assume various forms:

1. They can be the right of the sovereign to control the air space above its territory which forms part of Public International Law as laid down, first, in the Paris Convention of 1919 and reaffirmed at Chicago in 1944 at the Convention of the International Civil Aviation Organization according to which "Every State has complete and exclusive sovereignty over the air-space above its territory." A typical example of a State's national sovereignty claim is found in Section 1108 (a) of the Federal Aviation Act (72 Stat. 731) of 1958 under which "The United States is declared to possess and exercise complete and exclusive national sovereignty in the air-space of the United States, including the air-space above all inland waters and . . . above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction." This is no more than a modern, legislative version of the rights which, according to Prof. John C. Cooper, an outstanding authority on Aviation Law, States have since Roman times continuously recognized, regulated and protected; they were rules of private law in favor of owners or occupants of lands on the surface below, but constitute proof that States have always claimed and exercised territorial sovereignty in space above their surface.[14]

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[5] COOPER, ROMAN LAW AND THE MAXIM CUJUS EST SOLUM, 1952 USAvR at 627.

[6] THE INSTITUTES 130 (1907 Translation).

[7] As cited by COOPER, *op. cit. supra* n. 5, at 627.

[8] MANION, LAW OF THE AIR 1 (1950); BROWN, LEGAL MAXIMS 395 (8th ed. 1882).

[9] BLACK'S LAW DICTIONARY 453 (4th ed. 1951).

[10] BROOM'S LEGAL MAXIMS 395 (8th ed. 1911).

[11] HALKERSTON, A COLLECTION OF LATIN MAXIMS AND RULES 33 (1823); TAYLER, THE LAW GLOSSARY 83 (1880).

[12] PELOUBET, A COLLECTION OF LEGAL MAXIMS 44 (1880); ANDERSON, DICTIONARY OF LAW 959 (1889).

[13] LAW LATIN 136 (1910); see also 3 BLACKSTONE COMMENTARIES 217.

[14] COOPER, *op. cit. supra* n. 5, at 602, 603. John Cobb Cooper was Professor of International Air Law at McGill University, Montreal, from 1951 to 1957 and is now Professor Emeritus. 1934-1945 he was Vice-President of Pan American World Airways and from 1951 to 1955 Director of the Institute of International Air Law at McGill University.

2. Another form of air rights has long been recognized by English and American Law in the principle of lateral ownership above the surface. This division dates back to the Chambers in the Inns of Court and other buildings in London and other places[15]; Lord Coke states that a "man may have an inheritance in an upper chamber though the lower buildings and soil be in another." In our large cities tall buildings are erected over railroad property and tracks with the attendant grant or reservation of all that part of the premises lying above a certain plane. Sometimes such rights can only be created by the Legislature, but no matter how they come into existence they show that ownership of air space above the surface of land may be acquired.[16]

3. The most important forms of air rights, however, are those connected with the use of space dating back to a time when only birds and, maybe, kites were flying, but man needed space as a reservoir for air to breathe, access to the heavens for light and heat from the sun, for walking on public or private roads, for building houses and for growing crops and trees.[17] While there has always been disagreement whether these were rights of complete ownership or of only as much as needed for the enjoyment of the surface property below, they were in existence for thousands of years before the invention of the art of flight in 1783, and an equitable balance had to be struck between the air rights of the landowner and those that wanted permanent or temporary user of his air space.

Roman Law could not busy itself with trespasses through the air space lasting minutes (airships and airplanes) or seconds (projectiles and missiles), but only with old-fashioned and needed elements like air, light and rainwater. Roman Law was essentially practical and never treated land merely as a flat surface entirely disassociated from space above. The classical "dominium" of the Roman Law meant full and free use of all above the land and freedom of interference with the air above.[18] The result was the entire lacking of an upper limit to ownership; rules concerning the height of buildings and overhanging trees were promulgated merely as limitations in the general interest.[19] Prof. Goudy, in 1913, went so far as to state that Roman Law would have granted interdicts to prevent air transit if damages were caused or threatened;[20] such interdict would have been "quod vi aut clam," a mandatory injunction to restore what had been done by force or stealth, subject to a one-year statute of limitations.[21] And Prof. Lardone

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[15] Co. Litt. 48b; *Corbett v. Hill*, L.R. 9 Eq. 671 (1870). See also BALL, 39 Yale L.J. 616 and Art. 664 of the French Civil Code repealed on, and replaced by the Law of, 6-28-1938.

[16] THURSTON, TRESPASS TO AIR SPACE, HARVARD LEGAL ESSAYS IN HONOR OF PROFESSORS BEALE AND WILLISTON 513 (1934). According to news reports an interesting mixture of sovereign and lateral air rights on different planes was claimed by the USSR in their reply to our protest against the "buzzing" by three Russian fighter planes of an unarmed U.S. Lockheed Hercules C-130 transport plane in the Berlin Air Corridor on March 27, 1959: the Russians asserted that "the air above 10,000 feet is Russian air" which leaves open the question whether from 0 to 10,000 feet it belongs to East Germany or the three Western Powers. According to the New York Times of April 2, 1959 this claim to ownership was based by a Spokesman at the Soviet Embassy in East Berlin upon a "prescriptive right" acquired since the German surrender 13 years ago. The Russian Military must have done quite some reading of recent U.S. decisions dealing with air easements and "taking" of air space rights! The United States maintains that its recognized right to fly along the 20-mile wide corridors leading to West Berlin has no altitude limitations.

[17] COOPER, *op. cit. supra* n. 5, at 603.

[18] 1 ROBY, ROMAN PRIVATE LAW IN TIMES OF CICERO AND THE ANTONINES 498 (1902).

[19] BUCKLAND, THE MAIN INSTITUTION OF ROMAN PRIVATE LAW 103-4 (1931).

[20] TWO ANCIENT BROCARDS 231.

[21] ROBY, *op. cit. supra* n. 18, at 521.

who at the time was an Associate Professor of Roman Law at Catholic University in Washington, D.C., while limiting the control of the air column above his property which the Corpus Juris Civilis gave the landowner, to low altitudes such as the height of buildings and trees, claimed in 1931 that the spirit of the sources would extend such control to any altitude.[22] Other writers, however, found in the Digest and Institutes limitations which retrospectively could be defined as "interest qualifications" and were, at a later time, incorporated in most of the Continental Codes.[23] Thus Von Ihering, the great German jurist, gave ownership to the owner of the soil below only as required to satisfy his practical needs and not a right of property in space without limit.[24] Nowhere does the Digest state "up to the skies" or "to infinity" except in VIII.2.24; and "dominium" is not mentioned, only "as high as the landowner pleases." Reverting to Public versus Private Law, the Roman State controlled the air space as it was not essential to the enjoyment of the land below.[25] Two French writers, Guibé[26] and Sauze,[27] and two Italian jurists, Bonfante[28] and Pampaloni,[29] have denied the Roman landowner air space rights of ownership although the latter concedes him an exclusive power equal to ownership.

Roman Law dealt with interests in the air space over public and other non-commercial lands, such as religious property and tombs, as well as private lands.[30] What are the sources to which the writers have been referring over hundreds of years? The oldest were the Twelve Tables of which the text has not survived, but according to Ulpian in Dig. XLIII.27.1.8 they established in 450 B.C. the fifteen foot rule of trimming branches of trees overhanging fields in order to prevent their crops being damaged by shade: "A neighbor cannot keep the owner of land which is overhung by a tree from his land, from cutting the tree within fifteen feet."[31] And if the tree overhung a building, its owner could cut it down entirely.[32] While this was the oldest protective rule for the enjoyment of air and light by a Roman owner of land, the most important phrase was coined by Paul to protect public lands and also highways, in Dig. VIII.2.1:

> "...caelum (equal to coelum), quod supra id solum intercedit, liberum esse debet."[33]

This was the basis for the famous gloss which, in the form of a note attributed to Accursius, did the most to affect the problem and create the maxim as it has been known to this day.[34] Paul did not allow a beam or overhanging roof or other projecting structure or discharge of flowing or dripping rainwater to interfere with the ownership of underlying land. Venuleius, in

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[22] AIRSPACE RIGHTS IN ROMAN LAW, 2 Air L. Rev. 455 (1931).

[23] See Ch. V, *infra*.

[24] ZUR LEHRE VON DEN BESCHRAENKUNGEN DES GRUNDEIGENTHUEMERS IM INTERESSE DER NACHBARN (1863), as cited by COOPER, *op. cit. supra* n. 5, at 604.

[25] DE MONTMORENCY, THE CONTROL OF THE AIR SPACES, Vol. III, p. 67 (1917).

[26] ESSAI SUR LA NAVIGATION AERIENNE EN DROIT INTERNE ET EN DROIT INTERNATIONAL (1912).

[27] LES QUESTIONS DE RESPONSABILITE' EN MATIERE D'AVIATION (1916).

[28] COOPER, *op. cit. supra* n. 5, at 605, n. 15.

[29] *Id.*, at 605, n. 14.

[30] *Id.*, at 605. COOPER uses the KRUEGER-MOMMSEN edition (Berlin 1915-1928) of Institutes, Digest, Code and Novellae.

[31] MCNAIR, THE LAW OF THE AIR 294 (2nd ed. 1953); COOPER, *op. cit. supra* n. 5, at 608. ARNOLD DUNCAN the First Baron MCNAIR, Q.C., was Vice Chancellor of Liverpool University from 1937 to 1945, President of the Institute of International Law from 1948 to 1950; from 1946 to 1955 he was Judge and from 1952 to 1955 President of the International Court of Justice at The Hague.

[32] COOPER, *op. cit. supra* n. 5, at 609.

[33] *Id.*, at 606.

[34] *Id.*, at 618.

Dig. XLIII.24.22.4, allows the interdict "quod vi aut clam"[35] to protect a tomb from a projection or rainwater coming from another roof which, however, did not itself touch the monument:

> ". . . sepulchri sit non s o l u m is locus, qui recipiat humationem, sed omne etiam supra id c a e l u m."

This is where Sauze[36] in 1916 detected the origin of our maxim. In Dig. VIII.5.8.5 we find a holding of Ulpian's again where he considered smoke coming from a cheese factory which interferes with a high adjoining house, a trespass into air space. But the same Ulpian states, in Dig. IX.2.29.1, that a landowner inconvenienced by a neighboring roof extending over his house, must not break it off, but bring an action against his neighbor.

It is easy to see how a glossator could have put together a maxim from these holdings, but it is certainly surprising to find a Roman Law holding by Ulpian which is practically "on all fours" with the case decided in *Bury v. Pope*: Ulpian and the English Judges had to deal with almost the same set of facts where in England a landowner erected a house with a window so close to a window in the adjoining property that the light was cut therefrom, and it was held that the injured landowner had no complaint even though his building and his window were built forty years before the second;[37] Ulpian also held in Dig. VIII.2.9:

> "cum eo qui tollendo obscurat vicini aedes, quibus non serviat, nulla competit actio,"[38]

although, under certain circumstances, the injured landowner could ask for the appointment of an arbiter.[39]

There is finally another holding of Paul's in Dig. VIII.2.24 which led Cooper[40] to see a clear meaning that there was no legal limit to which a building could be built as long as it did not interfere with buildings underneath:

> ". . . ius est in infinito supra suum aedificium imponere dum inferiora aedificia non graviore servitute oneret quam pati debent."

After distinguishing between "coelum" as space which is subject to private and exclusive rights, and "aer" which is common to all men, Cooper[41] comes to the following conclusions as to the Roman Law:

1. The air space over lands not subject to private ownership, such as public and religious lands, had the same legal status as the surface, namely state control.
2. The air space over private lands was
   (a) exclusive property of the landowner up to an indefinite height, subject only to building restrictions, or
   (b) vested exclusive right of occupancy or user by the landowner.
3. Gaseous "aer" was common to all to sustain life, but there were vested rights of the landowner in "coelum."

We now have seen that there were some passages in Roman Law which may be quoted as having some relevance upon the user of air space and which, taken out of context, could have been used to weave a maxim, but the maxim is not Roman.[42] Goudy too, only detected "a trace of a similar

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[35] See p. 239, *supra*.
[36] *op. cit. supra* n. 27, at 26.
[37] MANION, *op. cit. supra* n. 8, at 2.
[38] COOPER, *op. cit. supra* n. 5, at 611.
[39] *Id.*, at 612.
[40] *Id.*, at 610.
[41] *Id.*, at 615-6.
[42] MCNAIR, *op. cit. supra* n. 31, at 294.

idea" in a passage in Venuleius (Dig. XLIII.24.22.4) whom he called an "obscure jurist," but nowhere in Roman Law did he find the phrase "although it is consistent with Roman Law!" Guibé[43] in 1912 and Eugène Sauze[44] in 1916 are generally credited with research work which verified Accursius as the author of the most important gloss leading to our maxim.[45]

Who was this Accursius? He appears to have been the last and, perhaps, the greatest of the Glossators who expounded the individual texts of Justinian's great work through annotations, clarifications and cross-references; their most important period lasted from about 1100 to 1250. Cooper gives him the first name of Franciscus, but according to another source[46] only his sons adopted first names although his could have been Dominic. Cooper puts the date of his birth at 1182 and his death at 1260, but according to the other source he was born at Bagnolo, Florence in 1184 or 1185 and died in Florence in 1263. He came not from a noble, but maybe only peasant family. He studied at Bologna, probably with the great Azo, but also with Jacobus Balduini. By 1228 he had finished his Glossa Ordinaria on the whole Corpus Juris Civilis. He taught for 25 and lived for 35 more years. He died in Florence in 1263 after having been a judex under the podestà of Florence as late as early in the year of his death. This famous glossator whose large library has been traced to his law studio and to some of his sons, is the one whose gloss in a note to Dig. VIII.2.1 is the original form of our maxim:

> "NOTA. Cujus est solum, ejus debet esse usque ad coelum, ut hic, & infra 'quod vi aut clam' i f. § pen."

This is the Accursian gloss. But Goudy tried to trace it back further; he declared himself, however, unable to say whether the maxim was really due to Irnerius who gave at Bologna in the 12th century the first lectures on the newly discovered Digest, or to someone else since he failed in finding any trace of the phrase in the Digest or elsewhere.[47] Goudy, too, places emphasis on the weaker form of "debet esse,"[48] and according to him Cujacius (or Caujas), a French Romanist (1520-1590) gave it a somewhat different locution:

> "Quo jure est coelum eodem jure esse debet solum et contra."

Again we find the weaker "debet esse," but Accursius, in his gloss, also refers to the interdict "quod vi aut clam" which, being a mandatory injunction, strengthens somewhat the rights of the injured landowner. Goudy complains that Barbossa did not give our maxim at all, but according to Cooper[49] the Accursian gloss reappeared in a great number of 15th and 16th century editions of the Digest.[50]

We have thus noted how Accursius, a glossator, has woven from a few passages in the Digest protecting the air space above public lands, highways, tombs, fields and buildings from shading, darkening, rainwater and smoke, a clever general maxim which, with a small variation, seemingly made its

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[43] *op. cit. supra* n. 26, at 38.
[44] MANION, *op. cit. supra* n. 8, at 2; see n. 27, *supra*.
[45] COOPER, *op. cit. supra* n. 5, at 618, n. 61.
[46] 46 L.Q.Rev. 148-9 (1930).
[47] According to "F.A.L., a learned correspondent" in 47 L.Q. Rev. 74 (1931) whom I assume to be the author cited in n. 48, *infra* since his contribution to the Law Quarterly Review deals with the same subject.
[48] As cited in LINCOLN, THE LEGAL BACKGROUND TO THE STARRS 65 (1932).
[49] *op. cit. supra* n. 5, at 618, n. 63.
[50] Venice 1477, 1482, 1484, 1488, 1489, 1490, 1491, 1494, 1498, 1584;
Nuremberg 1482;
Lyons 1531, 1537, 1542, 1552, 1566, 1572, 1580, 1589;
Paris 1548, 1559, 1566, 1576;
Antwerp 1576.

first appearance in its new form about 30 years later in an English window-obstruction litigation "on all fours" with Ulpian's holding in Dig. VIII.2.9.[51]

CHAPTER III

ITS JEWISH HISTORY

For a while, let us forget all about *Bury v. Pope* in 1586 and go back 300 years, but not to Bologna or Florence; let us stay right there in England and visit Rabbi Oshaya ben Rabbi Isaac known as Ursell in the City of Norwich. On December 2, 1280 (others put the year at 1285) the Rabbi conveyed to Gilam the Norman certain property which he had obtained as part of the dowry of his wife Miriam. The document has fortunately been preserved in the British Museum[52] and represents a remarkable mixture of English and Jewish Law although it is clearly made under Jewish Law throughout.[53] It is a "starr" (hebr.: sh'tar, a contract; french: estar; medieval Latin: starrum) and the ill-famed Star Chamber at Westminster may have been so named because it contained the starrs of pre-expulsion Jews;[54] but Fowler[55] calls this a mere conjecture. Starrs were bi-lingual in Hebrew and Latin and, in the English starrs, the names were in Hebrew and French. The first Jews in England came with the Normans in 1066. They were known as "Gyuus" in the spelling of the Patent Roll for 1269, and between Christians and Jews the laws of the Jewry (spelled "Gyuverie") applied; these were special laws enacted by the King as appendix to his "Charter to the Jews"[56] and the Jews remained the servants of the King alone. There was even a Jewish Exchequer, a branch of the main Exchequer Court and, although they were Christians, "Justices of the Jews" sat in the Jewish Exchequer and were naturally exposed to Jewish Law and its application.[57] When the Normans ceased to be strictly "Normans" and became English in sentiment as well as in domicile, the Jews were driven out in 1290, but the influence of their highly developed legal system had made itself felt.

Now let us return to our document No. 1199 drawn up just ten (or five) years before the expulsion. In line 14 it defines the rights of an owner as being "from the depth of the earth to the height of the sky." The strange coincidence between this starr and the decision in *Bury v. Pope* is that the starr was drawn up using the same maxim at the time of the reign of Edward I, "the English Justinian," which was cited, 300 years later, with the mysterious note "Temp. Ed.I" of which no one appears to have discovered the source, in the case; whether the pseudo-Roman maxim was cited as part of the judgment or simply added by Croke, the reporter, is equally unclear.[58] Mr. Lincoln comes to the conclusion that the origin of the maxim might be found in Jewish Law and Prof. Holdsworth, in his foreword to Mr. Lincoln's 1932 treatise, finds Mr. Lincoln's suggestion that Jewish influence upon legal doctrine could be traced in the acceptance by English Law of our maxim "very interesting and deserving further investigation." The phrase used in our starr, being akin to the pseudo-

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[51] MCNAIR, *op. cit. supra* n. 31, at 296.

[52] STARRS AND JEWISH CHARTERS PRESERVED IN THE BRITISH MUSEUM, Vol. I by ABRAHAMS AND STOKES 102 *et seq.*, Vol. II by LOEWE 107, 290 Document No. 1199 (1930).

[53] LINCOLN, *op. cit. supra* n. 48, at 63; the same treatise is reprinted on p. LVII *et seq.*, Vol. II, *op. cit. supra* n. 52.

[54] FUNK AND WAGNALLS, JEWISH ENCYCLOPEDIA, Vol. XI.

[55] FOWLER, ON CERTAIN STARRS, The Yorkshire Archaeological and Topographical Journal, Vol. III, p. 62, n. a (1875).

[56] LINCOLN, *op. cit. supra* n. 48, at 19, 53.

[57] *Id.*, at 52-3.

[58] LINCOLN, *op. cit. supra* n. 48, at 66; MCNAIR, *op. cit. supra* n. 31, at 297.

Roman maxim, can also be found in starrs drawn up in Cologne, Germany, a flourishing Jewish community since Roman days when Agrippina, daughter of Agrippa, founded her "Colonia Agrippinensis," and these contracts were also made during the same period as document No. 1199;[59] at an even earlier date it can be found in some starrs from Barcelona, Spain in Gulak's collection. But we may go back much further into Jewish Jurisprudence: in the Mishnah (Baba Bathra, IV, 2) Rabbi Akiba's dicta in regard to the use of the phrase are quoted, and Rabbi Akiba died in the year 132. Still earlier references can be found in Mr. Loewe's work who traces the importance of vertical air space ownership back to its role in the arid desert lands of the Mideast.

Mr. Lincoln rightly finds it remarkable that the maxim reached England at the same time as the Jews who themselves had used it for more than one-thousand years. The maxim was constantly employed by them whereas the Glossators hardly ever mentioned it.[60] Although he admits reluctantly that any dogmatic assertion cannot be arrived at, Mr. Lincoln feels justified in suggesting that the maxim entered English Law through Jewish usage and influence.[61]

CHAPTER IV

ITS ENGLISH HISTORY AND APPLICATIONS

Prof. Goudy traces our maxim to Croke's Reports in the time of Elizabeth (1558-1603) where, in *Bury v. Pope*, some reference is made to its use in the time of Edward I (1239-1307).[62] The mysterious note "Temp. Ed. I" connects the adoption of the phrase not only with the time of the Jewish settlement and the use of Jewish Law, but also with the visit to England of one of the sons of Accursius, the Glossator who had coined the, let us say, Roman-Latin version in contrast with, and yet akin to, the Hebrew-Latin locution in the starrs.

Franciscus Accursius, the glossator's eldest son and equally a teacher of Law, appears to have come to England in 1274 upon the invitation of King Edward the First who seems to have met him in Bologna on his way home from the Holy Land. He was employed by Edward on public business, lectured on the law at Oxford where Vacarius had taught Roman Law as early as 1151, and appears to have left England in 1281 after having secured a pension.[63] His seven-year stay must have had considerable impact on English legal thinking and may have constituted the scientific link between the work of the glossators at Bologna and the English Bar and Bench. Grotius, in 1646, lists Franciscus Accursius with Bartolus (1313-1357), the greatest of the Commentators or Post-Glossators, as among those "who long ruled the Bar."[64]

These two presumed mainstreams, Jewish Law and the Glossa, fed our maxim to the English Courts who, beginning in 1586, used it at first in cases dealing with ancient lights and overhanging leaves, but later, along with the American Judiciary, frequently referred to it on invasions of other interests in superincumbent air space.[65] Coke and Blackstone[66] discussed

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[59] JUDENSCHREINSBUCH 64 No. 181.
[60] LINCOLN, *op. cit. supra* n. 48, at 66.
[61] *Id.*, at 67-8.
[62] *Id.*, at 66.
[63] MCNAIR, *op. cit. supra n.* 31, at 297, n. 13.
[64] COOPER, *op. cit. supra* n. 5, at 618, n. 60. See also MANION, *op. cit. supra* n. 8, at 2; RHYNE, AIRPORTS AND THE COURTS 95, n. 38 (1944). Charles S. Rhyne was President of the American Bar Association, 1957-58.
[65] THURSTON, *op. cit. supra* n. 16, at 503.
[66] 2 Comm. 18 and 3 Comm. 217.

the maxim in their Commentaries as, in 1826, did Chancellor Kent in the United States when he restated[67] that

> ". . . land, according to Lord Coke, . . . has an indefinite extent, upward as well as downwards, so as to include everything terrestrial, under or over it . . ."

Kent, however, shows a note of caution when he uses the word "terrestrial" which could hardly refer to "coelum" in the Roman sense as being subject to private and exclusive rights; Kent would certainly have employed the term "celestial" in an upward direction whereas the word "terrestrial" would have been more proper in describing rights to the solid strata of "terra," the earth underfoot, or to things connected with the soil in an upward direction, such as crops, trees and buildings.

But maxims are not the Law. Smith[68] has stated that maxims are not meant to take the place of a digest; they are neither definitions nor treatises; some ought to be amended and some to be discarded altogether. Unfortunately there were no famous English glossators or commentators on the Corpus Juris Civilis which, for English law-men, never became the starting point for systematic reasoning and investigation that it was on the Continent.[69]

In this conjunction McNair[70] delivers a scathing attack on the English Bar in attributing the "tyranny of this maxim" in England partly to the traditional respect which English lawyers while rejecting the complete Corpus Juris Civilis, habitually show to what they conceive as a rule of Roman Law "when it happens to accord with their own ideas," and partly to the "grandiloquent manner" adopted by English lawyers, notably Coke and Blackstone, in exalting the extent and importance of property in land. He continues his attack by stating no less vitriolically:

> "The maxim like most maxims, and slogans, has merely been used either to darken counsel or to afford a short cut and an excuse for not thinking the matter out."

Landowners fare no better at his hands. "Coined centuries before any thought of flying machines, . . . frequently invoked in circumstances which demand a more complex analysis, . . . having the inestimable advantage of being couched in Latin, it has been glibly canvassed by landowners claiming that their property rights have been infringed."[71]

Lord Coke took the maxim not only from the first decided case in which it was used, but he, too, endeavored to trace it back to the Year Books, citing 14 H. VIII, fo.12; 22 Hen. VI.59; 10 E. IV.14 and, in some editions, 6 E. IV.7, pl.18. The latter is a case where a landowner in 1466 complained of thorns falling on his land and the writers do not seem to have found much support therein for Coke or the Maxim. Furthermore, Prof. Holdsworth[72] in citing *Bury v. Pope* and Prof. Goudy, Essays in Legal History (ed. Vinogradoff, 1913) state that Coke's references to the Year Books there cited are incorrect, and this has been picked up by Rhyne[73] and McNair.[74]

14 H. VIII Fol. 12 is often said to be an erroneous citation for Fol. 1 Mich. Pl. 1 which refers to a case of birds nesting on leased land. It does not cite our maxim, but is closely related to it. It was an action by the Bishop

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[67] 3 COMMENTARIES ON AMERICAN LAW 402 (1892; first published 1826-30).
[68] THE USE OF MAXIMS IN JURISPRUDENCE, 9 Harvard L.R. 13 (1885).
[69] VON MEHREN, THE CIVIL LAW SYSTEM 10 (1957).
[70] *op. cit. supra* n. 31, at 294, 297.
[71] *Id.*, at 16.
[72] 7 A HISTORY OF ENGLISH LAW 485, n. 9 (1925).
[73] *op. cit. supra* n. 64, at 94, n. 37.
[74] *op. cit. supra* n. 31, at 16, n. 2.

of London for trespass quare clausum fregit and for taking birds which built nests in trees on parkland leased by him to the Defendant. In it Richard Brooke, Judge of Common Pleas, ruled in quaint Norman French:

> "Le lessour aura le terre sur que l'arbre cressoit, car l'a ad estre per le terre et per l'aire, et donques tout le terre sur que il cressoit in profundite, et tout l'aire que luy nurrish en altitude, perteigne a cesty a que l'arbre perteigne."

With the necessary correction as to its citation, this really is Coke's source closest to our maxim.

The remaining two are 22 Hen. VI Fol. 59, No. 11 at Trinity Term, which involves the ownership of six young goshawks as between tenant and landlord, and 10 Edw. IV Fol. 14 which involves thefts of muniments of title and quotes the goshawk case where the only connection could consist of the fact that goshawks are birds and pass over lands in flight. But none of these cases cite or quote the maxim for which Coke uses them as authority for his own statement.[75]

While Coke eliminated the neo-Latin word "summitas" from the citation as used in *Bury v. Pope* and made the maxim thus appear more authentically Roman, at the same time he rendered it more categorical and non-Roman by changing Paul's original[76] and Accursius's glossatory[77] "debet esse" into a mandatory "est." Thus the damage was done for centuries thereafter.

Although the maxim has no real authority in English Law, it has been grievously misunderstood and misapplied so far as its upward limit is concerned.[78] Eleven years after *Bury v. Pope* had been decided, the maxim was successfully invoked in *Penruddock's* case[79] where rainwater fell on Plaintiff's land from the roof of Defendant's building which overhung the land of Plaintiff. And after another thirteen years we find *Baten's* case[80] where the maxim served to uphold the right of a Plaintiff to abate a nuisance consisting in the overhanging portion of a house. None of these three early English cases were decided in a manner different from the Roman Law; the first one, *Bury v. Pope,* was "on all fours" with Ulpian's holding, and the later two could also be matched with some decision in the Digest. It is interesting to note that the latter two were actions of "quod permittat prosternere," a writ given by the Statute of Westminster II which lies against any person who erects a building, though on his own ground, so near the house of another that it hangs over or becomes a nuisance to it.[81] A similarity with the Roman interdict "quod vi aut clam" cannot be entirely denied.

Then—silence. For more than two hundred years the maxim does not reappear in the English decisions until it explodes, like a misfired missile, even if only as a dictum, in *Pickering v. Rudd,*[82] just thirty-two years after the invention of the art of flight in its most rudimentary stages. The case was a simple and, by now, traditional one: a board had been nailed by Defendant to his own wall so as to overhang Plaintiff's garden, and Lord Ellenborough, looking far into the future and into the maxim's possible application to aviation cases, remarked:

> "If this board overhanging the Plaintiff's garden would be a trespass, it would follow that an a e r o n a u t is liable to an action of trespass

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[75] RHYNE, *op. cit. supra* n. 64, at 95.
[76] See p. 240, *supra.*
[77] See p. 242, *supra.*
[78] MCNAIR, *op. cit. supra* n. 31, at 30-1.
[79] 5 Coke's Reports 100, 77 Eng. Rep. 210 (1597).
[80] 9 Coke's Reports 53b, 77 Eng. Rep. 810 (1610).
[81] 2 Lil. Abr. 413, as cited in THURSTON, *op. cit. supra* n. 16, at n. 21.
[82] 4 Camp. 219, 1 Starkie 56, 171 Eng. Rep. 70 (1815).

quare clausum fregit at the suit of the occupier of every field over which his balloon passes in the course of his voyage."[83]

Prophetic words indeed! Until then it had been doubted whether it was a trespass to pass over land without touching the soil, as one may in aircraft, or to cause a material object, as a shot fired from a gun, to pass over it. It was Lord Ellenborough who thought that it was not in itself a trespass "to interfere with the column of air superincumbent on the close."[84]

But this was but a single rocket-like projection into the future because, thirty years later, we are back to a simple cornice projecting over another's garden and precipitating rainwater thereon[85] which led Broom[86] to elaborate upon the by now commonplace maxim by stating that a person has no right to erect a building on his own land which interferes with the due enjoyment of adjoining premises and occasions damage thereto either by overhanging them, or by the flow of water from the roof and eaves upon them. Rabbi Akiba to whom we are indebted for earlier dicta on the same maxim in Jewish Law, could well have muttered once more that there is really nothing new under the sun!

The Roman-type decisions continue. In 1870 the English Equity Court held that a first-floor room which overhung Plaintiff's land, constituted a trespass for which he could recover damages. This led Salmond[87] to the commonly accepted statement that ownership and possession of land bring with them ownership and possession of the column of space above the surface "ad infinitum," citing our maxim. But he limits it to the extent that the landowner has in private law the right to use for his own purposes, to the exclusion of other persons, the space above it ad infinitum so that he may build the Tower of Babel if he pleases, and may remove all things situated above the surface even though they are the property of others and though their presence there does him no harm and is no wrong for which he has any right of action against their owners. This is in direct contrast with Lord Ellenborough's dictum which in 1865, fifty years after it and just five years after *Corbett v. Hill*, was attacked in *Kenyon v. Hart*[88] by Lord Blackburn who was inclined to think differently, and Sir Pollock considers his the better opinion. Clearly there can be a wrongful entry on land below the surface, as by mining, and under the Common Law Sir Pollock could not assign any reason why an entry above the surface should not also be a trespass unless the scope of possible trespass is limited by that of possible effective possession which might be the reasonable rule and is reflected by most of the Codes on the Continent. According to Pollock it would clearly be a trespass at Common Law to fly over another man's land at a level within the height of ordinary buildings, and it might be a nuisance to hover over the land even at greater height.[89]

In 1895 we find ourselves transported back over almost 2350 years to the Twelve Tables when *Lemmon v. Webb*[90] allowed a landowner to cut back the branches of a tree which overhangs his boundary whether or not they cause damages; he also has a right of action for actual damages caused thereby.

With the turn of the century we come upon cases of more technical and

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[83] At p. 221; MANION, *op. cit. supra* n. 8, at 3; BROOM, A SELECTION OF LEGAL MAXIMS 258 (10th ed. 1939).
[84] POLLOCK'S LAW OF TORTS 262 (15th ed. 1951).
[85] *Fay v. Prentice*, 1 C.B. 828 (1845).
[86] *op. cit. supra* n. 83, at 257.
[87] ON THE LAW OF TORTS 162 (12th ed. 1957).
[88] 6 B. & S. 249, 252, 34 L. J. M. C. 87 (1865).
[89] *op. cit. supra* n. 84, at 263.
[90] (1895) A.C. 1.

industrial nature gradually leading to aviation decisions. In 1884 the Queen's Bench in *Wandsworth Board of Works v. United Telephone Co.*[91] denied the Plaintiff a "proprietary right in the area of ordinary user" above a s t r e e t, declaring a wire at a height of thirty feet no trespass; otherwise "an ordinary proprietor of land could cut and remove a wire at any height above h i s f r e e h o l d." But according to modern English authorities a direct intrusion into air space at a height within the area of ordinary user is a trespass.[92] Still, in England, to this day, a non-legislative agreement has not been reached as to whether the owner of the surface has merely the exclusive right of filling the air space within that area[93] or whether he actually owns the air space.[94] The right to sue, on which, according also to Stephen,[95] there is little clear authority, has been prudently limited in England by the Air Navigation Act, 1920, Section 9 which, as amended by the Civil Aviation Act of 1949, Section 40, provides that

> No action shall lie in respect of trespass or . . . nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which having regard to wind, weather, and all the circumstances of the case, is reasonable, or the ordinary incidents of such flight . . ."

CHAPTER V

ITS CIVIL LAW ACCEPTANCE

At the time where the English Courts were temporarily silent about our maxim, we find, towards the end of the 17th Century, in both Germany and France a reappearance of the phrase which must have been dormant since the days of the Glossators in Italy.

In Germany it cropped up in a Doctor's dissertation whereas in France it served to explain a provision in a collection of customs which was the forerunner of the Code Napoléon.

In October 1687 Jean-Etienne Danck, a candidate for the degree of Doctor Juris at the University of Frankfort, defended before Prof. Samuel Stryk his thesis entitled "De Jure Principis Aereo" which found its way into the latter's collected works "Strykia Opera" published in Florence between 1837 and 1841.[96] It showed considerable research into the Corpus Juris Civilis, the works of Grotius and others and, citing Dig. XLIII.24.22.4 on tombs,[97] Dig. VIII.2.1 on public lands[98] and the Accursian Gloss,[99] it endeavored to apply the law of the air to the prince or ruler. It held that the ruler was not limited by building restrictions in erecting h i s castle, but could control p r i v a t e building heights; this is in contrast with an earlier Ordinance for the German Empire dating back to 1559 which allowed the destruction of castles which menaced the security of travelers below. It also defined his air rights as "regalia" or a source of income for the ruler which entitled him to levy a tax and license on windmills which used the air belonging to the ruler, and it finally declared the hunting of birds a monopoly reserved to the prince.[100]

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[91] 13 Q.B.D. 904

[92] BROOM, *op. cit. supra* n. 83 at 258; *Ellis v. Loftus Iron Co.*, (1874) L.R. 10 C.P. 19, 10 C.P.D. 10; *Finchley Electric Light Co. v. Finchley U.D.C.*, 1 Ch. 437 (1903); *Gifford v. Dent*, (1926) W.N. 336.

[93] MCNAIR, *op. cit. supra* n. 31, at 34-5.

[94] WINFIELD, LAW OF TORTS 340.

[95] 2 COMMENTARIES ON THE LAWS OF ENGLAND 331-2 (21st ed. 1950 with 1958 Suppl.).

[96] COOPER, *op. cit. supra* n. 5, at 624.

[97] See p. 241, *supra*.

[98] *Id.*

[99] See p. 242, *supra*.

[100] COOPER, *op. cit. supra* n. 5, at 625.

In France, too, building restrictions were mentioned by the commentators in conjunction with the compilation of La Coûtume de Paris, the most important collection of customs prevailing in Northern France in contrast with "le droit écrit," a mixture of customs and written Roman Law prevailing in the Southern part of the country which was therefore known as "le pays de droit écrit."[101] Article 187 of La Coûtume de Paris which was effective towards the end of the 17th Century, provided that:

> "Quiconque a le sol. . . . il peut et doit avoir le dessus (et le dessous) de son sol, et peut édifier pardessus (et pardessous);"

This sounds like a translation of our maxim, and Ferrière in his authoritative comments on La Coûtume[102] cites our phrase which conforms to what he calls "common law," and admits a regulatory power although no general ordinance in France limited the height of buildings. Article 187, in turn, was the basis of Article 552 of the Code Napoléon which, in limpid simplicity, states in Subsection 1:

> "La propriété du sol emporte la propriété du dessus (et du dessous)."

A few years after the promulgation of the Code Napoléon, Art. 297 of the Imperial Austrian Civil Code (Allgemeines Buergerliches Gesetzbuch fuer das Kaiserthum Oesterreich, 1811) provided:

> "Unbewegliche Sachen sind Haeuser und andere Gebaeude mit dem in senkrechter Linie darueber befindlichen Luftraume."

As yet we find no limitation to the codified right of the landowner to the superincumbent air space and no consideration for aircraft which had been invented 28 years earlier. But only four years later Lord Ellenborough looked into the distant future and wondered about the rights of an aeronaut[103] while, after another seven years, word came from the New World that a balloonist who had come down in Plaintiff's garden in New York City had been held liable for the damage done by a crowd of followers whose trespass he was said to have caused[104] by his own.

But a mitigation of the harsh rule of our maxim which had been codified as such in France and Austria, began to be legislated towards the end of the 19th Century. The German Civil Code, enacted in 1896 and effective by the turn of the century at a time when balloons and crude dirigibles became better known, provides in Art. 905:

> "Das Recht des Eigentuemers eines Grundstuecks erstreckt sich auf den Raum ueber der Oberflaeche . . . Der Eigentuemer kann jedoch Einwirkungen nicht verbieten, die in solcher Hoehe . . . vorgenommen werden, dass er an der Ausschliessung kein I n t e r e s s e hat."

Thus, for the first time, we find a limitation of the rights of a landowner predicated upon his i n t e r e s t in the height of the space where the latter is being affected.

While, according to Nijholt[105] the French version of our maxim made its way into the Codes also of Belgium, Italy, Japan, The Netherlands, Portugal, the Province of Quebec, Spain, Switzerland and Turkey, his general statement made in 1910 needs considerable softening. The new Italian Civil Code,

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[101] VON MEHREN, *op. cit. supra* n. 69, at 9.

[102] CORPS ET COMPILATION DE TOUS LES COMMENTATEURS . . . SUR LA COUTUME DE PARIS, Vol. II, Col. 1543 (1714).

[103] *Pickering v. Rudd*, n. 82, *supra*.

[104] *Guille v. Swan*, 19 Johns. (N.Y.) 381, 10 Am. Dec. 234 (1822). According to PROSSER, LAW OF TORTS 62, n. 89 (2nd ed. 1955) this case was immortalized in a poem by Irving Browne, The Balloon and the Garden-Sauce, in 1889, 1 Green Bag 281!

[105] AIR SOVEREIGNTY 35 (1910).

worked out in close collaboration with French jurists before the Second World War and in force since 1942, does not at all define the space rights of the landowner above the ground; it simply states in Art. 840.2 the following limitation:

> "Il proprietario del suolo non puo opporsi ad attività de terzi che si svolgano . . . a tale altezza nello spazio sovrastante, che egli non abbia interesse ad escluderle."

Again we find the limitation of his exclusionary rights depending on the height in space in which he might have an interest to exclude the activities of intruders. This has its counterpart in Art. 823 of the Italian Code of Navigation of the same year which qualifies that:

> "Il sorvolo dei fondi di proprietà privata da parte di aeromobili deve avvenire in modo da non ledere l'interesse del proprietario del fondo."

Aircraft must not damage the interest of owners of land being overflown.

The French-language version of the Swiss Civil Code while copying in its entirety sub-section 1 of Art. 552 of the French Civil Code ("La propriété du sol emporte celle du dessus et du dessous") adds this important limitation to its Art. 667:

> "dans toute la hauteur et la profondeur utiles à son exercice."

The German-language version of Art. 667 in turn is very close to that of the German Civil Code in limiting air space rights

> "auf den Luftraum . . . soweit fuer die Ausuebung des Eigentums ein Interesse besteht."

Again the same "interest qualification" of the space which the landowner himself can put to his use which we find more and more in 20th Century codifications.

While the French Civil Code, to this day, does not contain this qualification of the landowner's rights, Art. 18 of the French Air Navigation Act of 1924, as codified by the Civil and Commercial Aviation Act of 1955, limits the right of an aircraft to fly over private property by providing that such right

> "shall not be exercised in any way which would interfere with the exercise of the rights of the property owner."[106]

Thus in France it is not a mutual exclusion—it is still the property owner who wins in the struggle with modern aircraft.

And now to our Civil Law neighbors to the North where, as recently as 1930, our maxim and the Code Napoléon were cited by Judge Newcombe[107] according to whom Coke expresses the Common Law of England from which the Law of Quebec (Art. 414 of the Civil Code based on that of Napoléon) is not materially different. He therefore concluded that the Courts in Canada had no authority to qualify it. Fortunately, Judge Newcombe was reversed and the Attorney General of Canada stated two years later[108] that our maxim does not apply so as to prevent aerial navigation from being a public right, and that flying over land is not a trespass to any property right, citing *Pickering v. Rudd* where Lord Ellenborough, 117 years earlier,

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[106] As cited in MANKIEWICZ, SOME ASPECTS OF CIVIL LAW REGARDING NUISANCE AND DAMAGE CAUSED BY AIRCRAFT, 25 JOURNAL OF AIR LAW AND COMMERCE 46 (1958).

[107] (1930) S.C.R. 663 as cited by COOPER, *op. cit. supra* n. 5, at 641.

[108] (1932) A.C. 54, at 57.

had expressed his first doubts as to aviation rights, and *Fay v. Prentice*, an old-fashioned Roman-type cornice and rainwater case.

Thus we can come to the conclusion that as far as the majority of the Civil Law areas are concerned, our maxim while still the mainstay of each code provision, has suffered invasions as serious as the landowner's air space itself.

CHAPTER VI

THE DEATH OF THE MAXIM AT THE HANDS OF THE COURTS IN THE UNITED STATES, AND THE RESTATEMENT OF TORTS

Both Cooper, the American author,[109] and McNair, the English jurist,[110] agree that the maxim in itself has no authority in English Law. And, after 110 years of American decisions in Federal and State Courts, the Supreme Court of the United States in its 1946 landmark holding in *United States v. Causby*[111] sentenced the maxim to death by stating that the ad coelum "doctrine has no place in the modern world." This decision followed by just two years Mr. Rhyne's conclusion that "all the courts have repudiated" the "unlimited ownership" or "ad coelum" theory.

But it took a long, slow erosion process until our highest judicial authority, through Mr. Justice Douglas, could pronounce sentence. Comparing the number of decisions in England with those in our country, McNair was "tempted to complain of an 'embarras de richesse.' "[112] At one time, deep into the 20th Century, there was a tendency here to give full sway to the maxim, but more moderate counsel, in most quarters, prevailed. McNair interprets that view as gaining support according to which the landowner owns only that amount of air space which is necessary for the effective use and enjoyment of the land. It took, however, the arrival of the flying machine to dispel the artificial fog which disgruntled and litiginous landowners had so effectively spread over their land by using our maxim.

In 1836, 110 years prior to the monumental holding in the *Causby* case, the Connecticut Court followed the Twelve Tables and, in a case dealing with overhanging branches, stated that "land comprehends everything in direct line above it."[113] In 1872 the Judges in Massachusetts considered overhanging structures such as eaves, a trespass.[114] In 1902 the Court in Iowa declared thrusting an arm across the boundary line a trespass in relying on our maxim as laid down by Lord Coke: "the title of the owner extends . . . upward usque ad coelum," but in a derisory vein the opinion continues that "it is, perhaps, doubtful whether owners as quarrelsome as the parties in this case will ever enjoy the usufruct of their property in the latter direction . . ."[115] This decision has often been compared with the English holding in *Ellis v. Loftus Iron Co.* in 1874 where a horse kicked through a fence, presumably at a lesser height even than Mr. Sessions' outstretched arm!

By 1906 electricity and gunpowder began to make themselves felt as trespassers into the air space. The courts continued to adhere to the Roman Law doctrine that bodily entry is not essential to a trespass. Telephone wires stretched in the air over land constitute a trespass without being in

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[109] *op. cit. supra* n. 5, at 636.
[110] *op. cit. supra* n. 31, at 30.
[111] 328 U.S. 256, 90 L. Ed. 1206, 66 S. Ct. 1062.
[112] *op. cit. supra* n. 31, at 33.
[113] *Lyman v. Hall*, 11 Conn. 177.
[114] *Smith v. Smith*, 110 Mass. 302.
[115] *Hannabalson v. Sessions*, 116 Ia. 457, 90 N.W. 93, 95.

contact with the landowner's premises.[116] And shooting cases were numerous in such different jurisdictions as Connecticut,[117] Georgia,[118] Minnesota[119] and Montana,[120] and shooting across the land was declared a trespass even though the bullets did not fall upon it. The most important of these is *Portsmouth etc. Co. v. United States* where, in 1922, the Supreme Court held it to be a trespass to discharge projectiles from heavy coast artillery over Plaintiff's land which amounted to a "taking" of his property rights by the Sovereign.[121]

But aviation cases present the most crucial problem of the application of our maxim in to-day's world. To deal with super-incumbent air space we cannot go back to the 1822 case of *Guille v. Swan* because there it was not Swan, the balloonist, in piloting his aircraft over many a parcel of land in old downtown New York, but his followers who fregerunt Mrs. Guille's clausum in trampling down her grass and flowers and vegetables, a trespass so much "down to earth" that it would always have given rise to an action, regardless whether in Rome, Judea, England or America.

The first aviation case actually dealing with intrusion into air space came up as late as 1930 in one of the few decisions basing a landowner's rights on the theory of trespass and the only one which granted any relief to the complainant; in it the Massachusetts Court held that the landowner owns the air space over his land only up to a height set by Statute and only an intrusion into this very column of air is a trespass;[122] in this case the land was used for the cultivation of trees which attained a height of hundred feet, and the Court held flights at that height to be a trespass by applying the test suggested in Pollock on Torts[123] that the scope of possible trespass is limited by that of possible effective possession, which might be a most reasonable rule. Two years later, in 1932, the Federal District Court for Ohio held, in discarding the ad coelum rule, that the landowner's "right of occupancy extended only to the lower stratum which he may reasonably expect to use or occupy himself," but "as to the upper stratum which he may not reasonably expect to occupy, he has no right . . . except to prevent the use of it by others to the extent of an unreasonable interference with his complete enjoyment of the surface."[124] Another two years later, in 1934, the Georgia Courts picked up the problem and declared[125] that a landowner cannot own what he does not possess and that ownership of air space extends only up to the "reasonable possibility of man's occupation and dominion" (back to Roman Law!) though "perhaps the owner may be in actual possession of the space immediately covering the trees, buildings and structures." And in 1936, after another two years interval, the Western New York District Court summarized the law in stating that "the owner of land has the exclusive right to so much of the space above as may be actually occupied and used by him and necessarily incident to such occupation and use, and any one passing through such space without the owner's consent is a trespasser."[126]

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[116] *Butler v. Frontier Telephone Co.*, 186 N.Y. 486, 79 N.E. 716.
[117] *Munro v. Williams*, 94 Conn. 377, 109 A. 129.
[118] *Hall v. Browning*, 195 Ga. 423, 24 S.E. 2nd 392.
[119] *Whittaker v. Stangwick*, 100 Minn. 386, 111 N.W. 295.
[120] *Herrin v. Sutherland*, 74 Mont. 587, 241 P. 328
[121] 260 U.S. 327, 67 L.Ed. 287, 43 S.Ct. 135.
[122] *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385; McNAIR, *op. cit. supra* n. 31, at 33; PROSSER, *op. cit. supra* n. 104, at 60.
[123] See p. 247, *supra*.
[124] *Swetland v. Curtiss Airports Corp.*, 55 F. 2nd 201, at 203.
[125] In *Trasher v. Atlanta*, 178 Ga. 514, 173 S.E. 817, at 825-6.
[126] *Cory v. Physical Culture Hotel*, 14 F. Supp. 977, at 982, aff'd 88 F. 2nd 411 (C.A.2, 1937).

This holding by a Federal Court in the East affirmed the excellent statement issued on the Pacific Coast by the Ninth Circuit Court which has been the gospel since 1936 and was cited approvingly, ten years later, by the Supreme Court in the *Causby* case. After restating Blackstone as follows:[127]

> "The air, like the sea, is by its nature incapable of private ownership except insofar as one may actually use it"

the Court in the West continues, regarding our maxim:

> "We think it is not the law, and that it never was the law. This formula 'from the center of the earth to the sky' was invented at some remote time in the past when the use of space above land actual or conceivable was confined to narrow limits, and simply meant that the owner of the land could use the overlying space to such an extent as he was able, and that no one could ever interfere with that use . . ."

This is the death knell for our maxim, and now the Court defines the upward limit of ownership:

> "We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land. This right . . . varies with our varying needs and is coextensive with them. The owner of land owns as much of the space above him as he uses, but only so long as he uses it . . . Any claim of the landowner beyond this cannot find a precedent in law, nor support in reason." [128]

The *Causby* case, the only United States Supreme Court case on this subject, but followed by the Court of Claims in the 1958 *Highland Park* case,[129] dealt with the effects of flights taking off from the military airport at Greensboro, N. C. during the Second World War, upon the peace and quiet of a neighboring chicken farmer and his flock; so many of his chickens flew into the walls of their coops from sheer fright that the farmer obtained $1,060 "rental" value for the four years of military "occupancy" of his immediate air space and $375 for the chickens which killed themselves. In the *Highland Park* case we deal with the decreased value of homes built near the military airport at Savannah, Ga. at a time when only propeller-driven planes were stationed there; when turbo-jets took over, the noise became so unbearable for the homeowners, both actual and prospective, that the developer suffered great losses and the United States was declared to have taken an "easement" in the overlying air space for which it was made to pay.

In the *Causby* case Mr. Justice Douglas declared that our maxim "has no place in the modern world." Following the *Hinman* decision which it cited approvingly, the Supreme Court states:[130]

> "The fact that (the landowner) does not occupy (the land) in a physical sense, by the erection of buildings and the like, is not material. . . . The flight of airplanes, which skim the surface, but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. . . . While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself."

Thus it can be concluded that the *Causby* case has finally rejected the theory of property rights in the air space at all altitudes, at least as far as our Judiciary is concerned.

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[127] 2 BLACKSTONE COMM. 14.

[128] *Hinman v. Pacific Air Transport*, 84 F. 2nd 755, at 757-8, cert. den. 300 U.S. 654.

[129] 161 F. Supp. 597.

[130] At p. 264-5.

Why then is this discussion entitled CUJUS EST SOLUM EJUS EST ..... QUOUSQUE TANDEM? The reason can be found in the Tentative Draft No. 2 of the Restatement of the Law, 2nd, Torts. Section 194 of this Draft declares "unprivileged" and therefore a trespass a flight of aircraft which interferes "unreasonably with the possessor's use or enjoyment of the surface of the earth or the air space above it." Section 194, as drafted, must be read with Section 159 of the present Restatement which is to remain unchanged and states that "a trespass . . . may be committed on, beneath or above the surface of the earth." This should so remain concerning occurrences common to an earlier era, such as protrusions of roofs or boards which have always been considered as trespasses, but a look at Comment (c) of Section 159 shows that, according to the present Restatement under "e," "an unprivileged intrusion in the space above the surface of the earth, at whatever height above the surface, is a trespass!" Quousque tandem? Thus the Restatement continues to adhere to the discarded maxim that the landowner's property right extends indefinitely into the sky! The Note to the Institute on page 36 of the Tentative Draft admits that the theory of unlimited vertical ownership

> "had almost no support in case law when it was first adopted by the Restatement and . . . has had little support in the cases since"

and, on page 38, it concedes it as being

> "obvious that sooner or later the theory of unlimited vertical ownership of the air space above the possessor's land will have to be discarded."

But why "sooner or later?" Has it not been sufficiently discredited? Quousque tandem?

For this reason four outstanding Attorneys employed as counsel by four major Air Carriers, among them Henry J. Friendly, Vice President and General Counsel of Pan American World Airways who has just been appointed by the President to the Bench of the Court of Appeals for the Second Circuit, have come to the conclusion, as members of the American Law Institute, in a memorandum to the Institute dated May 20, 1958 that the proposed Section 194 "does not accurately reflect the state of the law to-day" and its tentative draft should be withdrawn from consideration by the Institute and be returned to the Reporter and his Advisers for further study of the correlative rights and obligations of the landowner and the operator of aircraft and the very important legal and public interest questions presented. Quousque tandem?

William Empson[131] once said: "Law makes long spokes of the short stakes of men." Hasn't the time finally come to reduce the spokes reaching out into infinity to stakes that are no longer than man's interest qualifies?

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[131] Cambridge Poetry (1929) as quoted by Salmond, *op. cit. supra* n. 87, at 162, n. 40.

REPORT ON THE WARSAW CONVENTION AS AMENDED BY THE HAGUE PROTOCOL*

A. Introduction

THE Warsaw Convention[1] provides for a limitation of liability on the part of air carriers in respect of passengers, baggage and cargo moving in international carriage. The Convention has been in existence for almost thirty years and has been ratified by some forty-five countries, including the United States which ratified it in 1934. The Hague Protocol is, in effect, a new treaty incorporating important amendments to the Convention, notably a substantial monetary increase in the liability limitations. The Protocol was proposed by an international conference at The Hague in September, 1955, and was signed by delegates on behalf of twenty-six countries, including the United States, subject to ratification by their governments. It has been ratified by Czechoslovakia, Egypt, El Salvador, Hungary, Laos, Luxembourg, Mexico, Poland and the U.S.S.R. It seems to be conceded that most countries are awaiting the action of the United States, a prime mover for amending the Warsaw Convention, before determining whether to ratify the Protocol themselves.

In each of the last two years the Aeronautics Committee has devoted considerable study and discussion to the question whether the United States should ratify or reject The Hague Protocol. In the Spring of 1958 two extensive analytical reports were drafted by members of the Committee: Lee S. Kriendler and William G. Symmers. From these two drafts the present report has been largely drawn.

Exploration of the question of United States action on The Hague Protocol has exposed deeply divided opinions. This division of opinion has stemmed not so much from The Hague Protocol itself, but rather from a re-examination of the Warsaw Convention in terms of the present circumstances of commercial air transportation, of recent case law affecting the significance of the Convention and of actual experience gained in applying the Convention. Such opinions also have been affected by consideration of the United States' role in formulating The Hague Protocol and by general considerations of foreign policy in reference to continued United States participation in an international arrangement of long standing.

The controversy has revolved around one central point: the soundness today of the principle of limitation of liability. The analysis of the problem, therefore, should begin with the history and rationale of this principle as it has been embodied in the Warsaw Convention.

B. History and Rationale of the Warsaw Liability Limitation

The enactment of the Warsaw Convention, in 1929, was the result of international conferences on air law held in Paris in 1926 and Warsaw in 1929.[2] Its inception may be better understood in the light of its historical perspective. 1927 was the year in which Lindbergh flew the Atlantic. Amelia Earhart did it in 1928. In 1929 it was still uncertain whether the air age would be carried forward with lighter-than-air craft or heavier-than-air

* Prepared by the Association of the Bar of the City of New York, Committee on Aeronautics, and presented to the Stated Meeting of the Association on March 10, 1959.

[1] Complete title: The Convention for the Unification of Certain Rules Relating to International Transportation by Air; 49 Stat. part II, p. 3000.

[2] *Wright*, The Warsaw Convention's Damages Limitations, Cleveland-Marshall Law Review, May, 1957, p. 290.

craft. The international air giants of today were literally in their swaddling clothes. Air France, though founded in 1919, did little more than link France with England and Africa. KLM was limited to flights of two hundred or two hundred fifty miles. Pan American was the United States' only international carrier and its international operations were confined to Havana, Cuba, and Key West.[3] Passengers were not carried at night, and airplanes had a top speed of one hundred fifty miles an hour. Even in domestic travel, only 52,934 passengers were carried by air in the United States, in 1928.

Probably the principal problem facing the budding international airlines was the securing of capital, in the face of what appeared to be enormous hazards. In the absence of a limitation of liability one disaster might sweep away a large capital investment. It was in this atmosphere and era that the Warsaw Convention was enacted. Its most important provision was a limitation of liability for personal injury and death to passengers, to 125,000.00 Poincare French francs (gold francs of a weight and fineness equivalent to approximately $8,300.00).

The United States was not a party to the Paris Conference of 1926 or the Warsaw Conference of 1929. Its motivation in adhering to the Convention is clear, however. The State Department began considering the Convention in 1933. In 1934 the Department transmitted its approval to the President with a statement that "the principle of limitation of liability would lessen litigation and prove an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates and eventually reduce the operating expenses of the carrier."[4]

The imposition of a maximum limitation of damages represents a departure from ordinary American tort principles. The very essence of our tort law, based as it is upon fault, lies in the concept of the tortfeasor (or the one who causes the damage) bearing the responsibility and the cost of the damage. Thus, in a simple personal injury accident case, our Courts struggle to measure, as precisely as possible, the monetary equivalent of the damage caused, so that the victim may be "made whole." Similarly, in wrongful death cases, our law and our Courts attempt to measure the precise amount of pecuniary loss sustained by the surviving beneficiaries.

Thirteen states do have maximum limitations of damages for wrongful death, however, (Colorado — $25,000, Illinois — $30,000, Kansas — $25,000, Maine — $20,000, Massachusetts — $20,000, Minnesota — $25,000, Missouri — $25,000, New Hampshire — $10,000-25,000, Oregon — $20,000, South Dakota — $20,000, Virginia — $25,000, West Virginia — $20,000 and Wisconsin —$20,000). The number has decreased in recent years, and the limitations have increased. No states limit liability for personal injury.

The principle of limitation of liability to passengers for personal injury and death, in a somewhat different form, is also known to American Admiralty Law, wherein liability of a ship owner to death and injury claimants is limited. The limitation does not apply if the accident was caused by negligence or unseaworthiness known or imputed to the owner. In the recent Andrea Doria-Stockholm collision cases, all claims were settled for adequate damages within the limitation amount. It was not necessary for claimants to prove privity or knowledge on the part of the ship owners to recover adequate damages.

Attempts have been made to justify, explain, or rationalize the principle of limitation of liability in international private air law on numerous grounds. These grounds are summarized and discussed by H. Drion in a recent book entitled "Limitation of Liabilities in International Air Law" (*Martinus Nijhoff*, The Hague, 1954). Mr. Drion, who accepts the principle

[3] *Ibid.* p. 290, 291.
[4] Sen. Doc. Exec. C 73rd Cong. 2nd Sess. 1934; 1934 U. S. Av. R. 242-3.

of limitation of liability and considers international private air law "unthinkable without a limitation of the carrier's or operator's liability" lists eight grounds which "have been brought forward in justification of the limitation of the air carrier's or operator's liability." The eight are:

1. Analogy with maritime law with its global limitation of the shipowner's liability;
2. necessary protection of a financially weak industry;
3. catastrophical risks should not be borne by aviation alone;
4. necessity of the carrier's or operator's being able to insure against these risks;
5. possibility for the potential claimants to take insurance themselves;
6. limitation of liability as a counterpart to the aggravated system of liability imposed upon the carrier and operator (*'quid pro quo'*);
7. avoidance of litigation by facilitating quick settlements;
8. unification of the law with respect to the amount of damages to be paid.

1. *Analogy With Maritime Law*

Drion quickly dismisses this as a reasonable basis for justification of limitation of liability.

2. *Protection of a Financially Weak Industry*

Drion states:

> "From the start, the idea of helping an industry in its infancy—the public interest in which far exceeding its financial outlooks—has been a major factor in the limitation liability in air law. It was felt—without much foundation, as the later history of aviation, especially within the U.S.A., would prove—that with unlimited liability for the carrier 'all commercial aviation would be impossible.' (citing the Belgian delegate DeVos, who played a 'preponderant part' in the history of the Warsaw Convention.)" (Drion page 15).

Drion rejects this rationalization, stating, at page 16:

> "It is submitted that protection of the aviation industry is never a good ground for limitation of liability. If society wants to maintain air services although they cannot pay their own costs (including the damages they cause), it should frankly subsidize such services. 'Otherwise, one could as well take the view that a railway working at a loss, should not be obliged to pay for the expropriations effected as a consequence of its exploitation.'"

He goes on to say (page 16):

> "The idea that aviation would be impossible without limitation of liability is flatly contradicted by the facts. Though USA law has no limitation of liability of air carrier or aircraft operator, neither with respect to passenger or cargo claims nor to surface damage, there is no country in the world where civil aviation has developed to a comparative level. And not only does American law not know of special limitations of liability for the protection of aviation, but the claims awarded there against carriers and operators are avowedly higher than anywhere else."

3. *Catastrophical Risks Should Not Be Borne by Aviation Alone*

Drion points out that the possibility of catastrophical risks ruining a business is not peculiar to aviation, yet other businesses and industries are held accountable for injuries and damage caused by them. Drion rejects this rationalization as a reasonable justification for limitation of liability.

4. *Desirability That the Carrier or Operator Be Able to Insure His Liability Risks*

Drion states:

> "If one assumes that the desirability of the carrier or operator insuring his liability, and also that such insurance is only possible within limits,

> does that mean that the uninsurable part of the risk should be borne by the victim? This would be a sound conclusion only if the victim could reasonably and more easily have insured that part of the risk. But then the reason is not so much that the carrier could not insure himself against unlimited liability, but rather that the victim was in a better position to insure against that risk."

Drion concludes that "the desirability of the carrier or operator being able to insure their liabilities is no sound reason for limiting these liabilities . . ."

5. *Possibility for the Potential Claimants to Take Insurance Themselves*

This is one of the two grounds of alleged justification of limitation of liability in air law accepted by Drion. Drion states his point of view, at page 23, as follows:

> "Insurance presupposes a grouping of risks, and . . . the main criterion for determining the various groups seems to be the requirement of equal spreading of risk within each group. Where the risk is not equally spread over the various members of the group, those carrying the smaller risk will have to pay for the bigger risk carried by the other members of the group."

Thus Drion argues that, from the standpoint of damages, the man whose wrongful death would entitle beneficiaries to large damages is deriving some sort of benefit at the expense of the passenger whose wrongful death would result in smaller damages. This is the position taken by Paul Reiber, in an article entitled "Ratification of The Hague Protocol," the Journal of Air Law and Commerce, Volume 23, Number 3, Summer, 1956.

Drion himself recognizes the limitations of this argument. He points out that while from a damages standpoint, damages can better be calculated at the joint of the object of the risk (the person insured), from an incidence standpoint, risks can better be grouped around the point of the risk-creating activity, "because at that point more of the factors determining the incidence can be ascertained, such as quality of equipment, know-how of staff, carelessness, and surrounding circumstances . . ." (Drion, page 24).

Drion also states (page 24):

> "But for a further determination of the chance, that an occurrence insured against might happen, liability insurance has the advantage over passenger or shipper's insurance in that, by means of the loss experience of the carrier, such factors as efficiency, safety and organization can also be taken into account, whereby the risk can be more narrowly defined as far as the probable incidence is concerned."

It is well to point out that, while damages for potential wrongful death may be anticipated with some accuracy, it is impossible, from the passenger's standpoint, to anticipate potential damages for personal injuries. The highest verdicts and settlements in airline crash cases have been in personal injury cases. The very person whose wrongful death might result in virtually no damages to beneficiaries, may be so severely injured in an airplane crash that his or her damages for personal injuries may be huge.[5]

It may be noted also that the cost of insurance would be minimized if its burden were shifted to the carrier, since all passenger liability would then be insured in one transaction.

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[5] In *Scotti* v. *National Airlines* (U.S.D.C., E.D.N.Y., 1955) Fay Scotti, an injured passenger, was 48 years old, unmarried, and earning a very small salary. She had no dependents. Thus, had she been killed in the Elizabeth, New Jersey, crash of February 11, 1952, the recovery for her wrongful death would have been small. In the trial of her action for personal injuries, however, the jury awarded her $170,000 plus a waiver, by the defendant, of $16,000 advanced for medical and hospital expenses—a total of $186,000. The case was subsequently settled, on appeal for a total of $181,000.

6. *Limitation of Liability as a Counterpart of the Aggravated System of Liability Imposed Upon the Carrier and Operator*

One of the features of the Warsaw Convention is the creation of a presumption of carrier liability. Thus, under the Convention, in case of accident involving bodily injury or death to passengers, or loss or damage to baggage or cargo, the burden rests upon the air carrier to prove its freedom from negligence if liability is to be avoided. It has been argued, therefore, that the limitation of liability is a justifiable *quid pro quo* for this presumption of liability up to the limited amount.

On the other hand, it has been contended, particularly by attorneys experienced in the trial of air carrier personal injury and wrongful death cases, that the asserted advantages of the "presumption of liability" to the passenger or to the estate of a deceased passenger, have been greatly exaggerated. In civil law countries liability on the part of the carrier is presumed, anyway. The passenger need only prove the contract of carriage, plus the fact that he has not safely arrived at his destination, to establish his case. To escape liability the carrier must prove *force majeure* or exclusive negligence of the passenger in order to escape liability.[6] Even in common law countries, where a passenger may only recover upon proof of a carrier's negligence, the doctrine of *res ipsa loquitur* can be invoked, which, at least, provides the passenger with an inference of negligence sufficient to carry his case to the jury. Attorneys experienced in such matters say that as a practical matter even the doctrine of *res ipsa loquitur* is rarely needed by a plaintiff in a claim against an airline resulting from an accident. They say that the plaintiff, if he is fortunate in having diligent and knowledgeable counsel, can usually discover and prove a case of negligence against the airline. Airline accidents are carefully investigated, and the results of these investigations are made known to the public along with the source material that provided findings and conclusions. This is true of accidents in foreign countries as well as accidents in the United States. Where negligence can be proven, the shifting of the burden of proof, provided in the Convention, is of insignificant value. In any kind of serious case, the settlement value even if the case is not brought to trial will far exceed the limitations provided in either the Warsaw Convention or The Hague Protocol.

Drion rejects this rationalization as a reasonable justification for limitation of liability.

7. *Avoidance of Litigation by Facilitating Quick Settlements*

This is the second asserted rationalization for limitation of liability that Drion believes has merit. There can be no question that a sharp limitation of damages will avoid litigation and lead to quick settlements. As Drion points out, the often difficult question of ascertaining damages is virtually removed by a maximum limitation substantially below the actual damages in most cases. Thus a great area of disagreement is arbitrarily removed from the litigation and settlement process. This simplification of the judicial process is accomplished, however, at a substantial price—a price whose impact often rests on the surviving family of the deceased passenger who has failed to protect them by purchasing adequate insurance coverage and thus has left them face-to-face with the $8300 limitation of the Warsaw Convention.

8. *Unification of the Law With Respect to the Amount of Damages To Be Paid*

Drion has this to say (page 42):

> "If there is any field in which unification of the law on a world wide basis would be inappropriate, it is the field of the amount of damages to

[6] Drion, p. 32, citing numerous authorities.

> be paid in case of death or injuries. For in few areas local views and circumstances of a social and economic character are of such importance. Unification of the law as a ground for limitation of liability, therefore, should be rejected."

Drion sums up his conclusions on the rationalizations for limitation of liability as follows (page 42):

> "For the limitation of liability in case of death or injury of passengers, provided by the Warsaw Convention, the only sound rationales have been found to be (a) the better position of the passenger in insuring the risk of his death or injury in excess of the average passenger accident risk, and (b) reduction of litigation by offering an easy basis for settlement."

C. The Convention's "Wilful Misconduct" Exception

Article 25 of the Warsaw Convention provides that the carrier shall not be permitted to avail itself of the limitation of damages if the accident has been caused by what, in the original French of the Convention is referred to as *"dol." "Dol"* has been inaccurately translated in the official English and American translations as "wilful misconduct." In the Irish translation of the Convention *"dol"* is interpreted as "malice." In civil law countries where the Warsaw Convention has been enacted into national law, the word *"dol"* has been interpreted into the national words for gross negligence, and a similar definition has been accorded *"dol"* by a fairly recent French case.[7]

In the famous Froman case (*Froman* v. *Pan American Airways* (App. Div. 1st Dept.) 284 App. Div. 935, leave to appeal denied 308 N.Y. 1050, cert. denied 349 U.S. 947), the trial judge (Judge Steuer) charged the jury as follows:

> " 'Wilful' ordinarily means intentional; that the act that was done was what the person doing it meant to do. But the phrase 'wilful misconduct' means something more than that. It means that in addition to doing the act in question, that the actor much have intended the result that came about or must have launched on such a line of conduct with knowledge of what the consequences probably would be and had gone ahead recklessly despite his knowledge of those conditions." (record on appeal, pages 452-453).

Thus, in at least one American case, "wilful misconduct" has been defined as requiring infinitely more than *"dol"* requires in European countries. "Wilful misconduct" appears to require that the act of the carrier or its employee be intentionally done; that the actor must have intended the result that came about, or that he did the act with knowledge of what the consequences probably would be and that he did it recklessly despite his knowledge of the probable result.

Thus, it is clear that significant differences have developed between the various signatory countries to the Warsaw Convention on the character and the degree of fault required to defeat the limitation of liability; this, despite the avowed purpose of the Convention to establish uniformity.

D. Other "Practical" Exceptions to the Application of the Convention

1. *Liability of Aircraft and Component Manufacturers, Airport Owners and Operators, Governmental Agencies, and Maintenance Organizations*

Since the Convention, by its terms, only limits the liability of the carrier to a passenger or shipper, and since the applicability of the Convention depends upon the contract of carriage between the carrier and the passenger or shipper, it is obvious that aircraft manufacturers, aircraft component

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[7] Drion, pp. 208-209; *Missirian* v. *Air France* (Tribunal Civil de la Seine; 1956, 23 Journal of Air Law & Commerce 235).

manufacturers (manufacturers of engines and propellers, for example), airport owners and operators, governmental agencies, and independent maintenance organizations cannot claim the limitation of liability available to the carrier. Thus, in Warsaw Convention cases, they are likely to be brought in as defendants despite the existence of very doubtful liability on their parts. This is unlike the situation in a non-Warsaw case, where the carrier, with its high duty of care, may well be liable for fault on the part of the other possible defendants, and where, therefore, other possible tort feasors are not too often joined as defendants.

2. *Agents and Servants of the Carrier*

Despite the fact that the Convention speaks only of the carrier itself, and does not, by its terms, expressly limit the liability of servants and agents of the carrier, there is some question as to whether this liability is limited or not. A recent case in the United States District Court for the District of New Jersey specifically holds that the Warsaw Convention does not limit the liability of servants and agents (*Pierre* v. *Eastern Air Lines and Foxworth*, 152 F. Supp. 486). The case specifically held that the liability of the pilot of an Eastern Air Lines airplane was not limited by the Convention. This view is supported by several recognized writers in the field.[8]

A contrary view is expressed by *Chutter* v. *KLM*, 132 F. Supp. 611 (U.S D.C., S.D.N.Y., 1955), and *Wanderer* v. *Sabena and Pan American*, 1949 U.S. Av. R. 25. Thus the issue must still be considered an open one.

E. Effect and Evaluation of the Warsaw Convention

1. *The Convention Does Not Create a Cause of Action*

American proponents of the Warsaw Convention, and the principle of limitation of liability, have argued, in the past, that the Convention was valuable to the American passenger in at least insuring him, or his beneficiaries, a recovery up to the Convention limits.[9] Thus, it has been argued that if an American passenger were killed in an accident occurring in Italy, recovery to his heirs would be limited to $256.00 (the domestic limitation in Italy) in the absence of the Convention, whereas, under the Convention, they could at least recover $8,300.00.

This argument has been seriously challenged by the recent decision of the United States Court of Appeals for the Second Circuit, *Noel* v. *L.A.V.*, 247 F. 2d 677, cert. denied, December 16, 1957. The *Noel* case clearly and specifically holds that the Convention does *not* create a cause of action. Thus, at least in the Second Circuit, in an action brought by the beneficiaries of a passenger who was killed in Italy, recovery would seem to be limited to $256.00, *despite* the Warsaw Convention, since the Convention, under the *Noel* case, simply places a maximum limit on recoveries permitted by local law.

No doubt the argument will be made, in future cases involving this situation, that under the civil law, the carrier's liability is basically contractual in character, and not delictual, and that the terms of the Warsaw Convention must be read into the contract between the parties. Thus, the argument may be made, that even in applying the law of Italy, the Convention limits will prevail. In view of the specific language of the *Noel* case, however, it would now appear that the Convention itself can no longer be said to guarantee the passenger a recovery of $8,300.00. Nor does the Convention achieve any uniformity in the law, under the *Noel* case, except in placing a maximum limit on recoveries.

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[8] Drion, p. 157, citing other authors, Calkins, 23 Journal of Air Law & Commerce 267.

[9] Reiber, 23 Journal of Air Law & Commerce 283.

2. *The Effect of the Convention in Essentially Domestic Cases*

The applicability of the Warsaw Convention does not depend on the places of departure and destination of the particular flight during which an airplane crashes. Rather, its application depends on the contract between the passenger or shipper and the carrier, and whether that contract provides for some international carriage between Warsaw nations, as defined in the Convention. Thus, an American passenger who buys a ticket in San Francisco for a flight to New York with connecting flights to London and Paris is bound by the Convention on every leg of his journey including the trip from San Francisco to New York.

Thus it frequently happens that on completely domestic flights most passengers are entitled to ordinary tort damages, depending upon the place where the accident happens, while a small handful of passengers find themselves limited to $8,300.00. In the crash of a Northeast Airlines DC6A, at Riker's Island, New York City in February, 1957, for example, there were over one hundred people on board the airplane. The flight was purely domestic, from La Guardia Airport in New York City to Miami, Florida. It crashed a minute and a half after take-off. One man on board had a round trip ticket from New York to Miami and back, and a connecting flight from New York to Montreal. He found himself limited by the Warsaw Convention! Four passengers, in all, were so limited.

The experience of several attorneys, who specialize in handling claims for plaintiffs, arising out of air crashes, has been that the Convention has played a part most often, in their experience, in these domestic situations.

3. *The Effect of Shifting the Burden of Proof*

As indicated above, the Convention, up to its limits, places the burden of proof upon the carrier to absolve itself from liability. This, of course, is of practically no value to a plaintiff in a case where negligence can be established. Where the facts are known and where they are presented by both sides, the burden of proof is not particularly important. Nor does the shifting of the burden of proof make any difference in civil law countries, where there is a presumption of liability on the part of the carrier anyway.

The shifting of the burden of proof is of value to a plaintiff, in a common law jurisdiction, where nothing whatsoever is known about the accident. In this situation a plaintiff might recover $8,300.00 under the Convention, whereas he might, theoretically, be unable to recover without it. As a practical matter, however, even in these jurisdictions the doctrine of *res ipsa loquitur* is available to the plaintiff. Briefly stated, it provides that where a defendant was in exclusive control of the instrumentality causing harm, and where the type of accident was one which did not ordinarily occur in the absence of negligence, the mere happening of the accident may give rise to a permissible inference of negligence on the part of the defendant. This permissible inference, of course, is sufficient to take an airplane case to the jury. And, as a practical matter, the settlement value of a serious case will far exceed the Warsaw limits anyway.

Thus, many contend that the shifting of the burden of proof is of only theoretical value to passengers and that it is insignificant when compared with the diminution of damages imposed by the Convention.

4. *Effect of the Wilful Misconduct Exception*

A legal judgment in excess of the Warsaw Convention limitation, obtained through proof of "wilful misconduct" has been sustained in only one reported case, *American Airlines* v. *Ulen*, 186 F. 2d 529 (C.A., D.C.). Recoveries in excess of the Warsaw Convention limitation, however, occur with

some frequency. Indeed, members of this Committee, both past and present, have participated in numerous settlements in excess of Convention limits. The existence of the limitation imposed by the Convention, of course, has played a part in these settlements, serving to reduce the settlements below the amounts that would have been received in the absence of the Convention.

F. Changes Made by The Hague Protocol

1. *The Limitation of Damages Is Doubled*

The Hague Protocol would increase the maximum limit of passenger liability damages to 250,000 Poincare francs, or $16,584.00. This is double the present limit of 125,000 Poincare francs, or $8,292.00. The proposed limit is actually a compromise between the $25,000.00 that the United States delegation to The Hague Conference wanted and what the other nations represented would agree to.

In addition, The Hague Protocol provides that, in addition to the prescribed limits, the court may award "in accordance with its law . . . the whole or part of the court costs and of other expenses of the litigation incurred by the plaintiff," unless the carrier shall have offered an amount equal to the amount recovered within six months after the date of the accident, or before the commencement of the action, if that is later.

The net effect of this provision, from the standpoint of the American passenger, and assuming that American jurisdictions would amend their own law to allow the inclusion of attorneys' fees and other expenses in Warsaw cases, would be to permit, in some restricted cases, potential recoveries in excess of the limitation and perhaps up to about $25,000.00.

This is more theoretical than real, however, since in actual practice this provision would have the effect of inducing quick settlements for Warsaw limits, before expenses—and perhaps even attorneys' fees—have been incurred.

Whether it is good policy to induce these quick settlements, is open to question. Very likely this provision will have the effect of inducing passengers or their beneficiaries to settle without even retaining lawyers. The speed of the possible settlement, and the fact that attorneys' fees would necessarily come out of the claimant's share of the recovery (since the offer would no doubt be immediate) would make claimants susceptible to the argument that there is no need for them to retain attorneys at all. Thus, in situations where claimants could recover more than Warsaw limitations (or Hague limitations) either from the carrier or from others, claimants might actually suffer by virtue of this provision. In any event, in the vast majority of cases, this provision will have no effect whatsoever, and does not serve to increase the liability limits of The Hague Protocol.

2. *Re-Definition of "Dol" and "Wilful Misconduct"*

The Hague Protocol amends the Warsaw Convention to eliminate the word *"dol"* and its inaccurate English equivalent, "wilful misconduct." In its place it substitutes the following provision:

> "The limits of liability specified in Article XXII shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; . . ."

This new requirement for upsetting the damages limitation of the Convention makes no change in the law if Judge Steuer's definition of "wilful misconduct," in *Froman* v. *Pan American*, supra, was correct. Experienced plaintiffs' attorneys have argued, however, that since this is an international treaty, the interpretation of *"dol"* made by French courts and other Euro-

pean courts should carry as much weight here in the United States as that of a domestic case. Thus they have refused to accept the severe interpretation of "wilful misconduct" made by Judge Steuer.

There can be no doubt that the new language of The Hague Protocol seriously tightens the "wilful misconduct" exception as it is administered in foreign courts.[10]

Thus, a serious question is presented as to whether this amendment concerning the degree of fault required to upset the damages limitation of the Convention will work to the detriment of the American passenger. Some experienced attorneys feel that it will reduce the possibility of settling cases in excess of the Warsaw limitation.

3. *Limitation of Liability of Servants and Agents*

The Hague Protocol extends to servants and agents of the carrier the limitation of liability available to the carrier itself.

In recent years suits have been brought against servants and agents of the carrier, including crew members, because of the obvious possibility of recovering unlimited damages. In the case of crew members an interesting situation has prevailed. Some carriers have "hold-harmless" agreements with their employees, providing that if judgments are rendered against the employees, the airline shall satisfy the judgments. In the case of other airlines, liability insurance written to protect the airline, has extended its coverage to employees of the airline. Thus, even in cases of financially irresponsible crew members, it has been possible to recover unlimited damages against the airline of its insurance carrier, despite the existence of the Warsaw Convention. There are no reported cases on this principle, but it is believed that this has been a factor entering into the settlement of some cases.

This amendment thus closes a loophole in the Convention. To those who accept the principles of the Convention, this plugging of a loophole is probably a good thing. On the other hand, to those who believe that the Convention is an evil, and is very harmful to American passengers, the closing of this loophole makes the Convention that much worse.

4. *Miscellaneous and Minor Changes*

Several miscellaneous and minor changes have been made in the Convention by The Hague Protocol. These pertain principally to simplification of documentation and notice of the Convention's applicability. None of these changes is of sufficient importance to affect a substantive attitude toward the Convention or to the principle of limitation of liability, and none will be discussed herein.

G. Possible Courses of Action for the United States

Given the Warsaw Convention and the changes in it proposed by The Hague Protocol, there are several possible courses of action for the United States to take. Theoretically, this country could refuse to ratify the Protocol but nevertheless continue to adhere to the Convention. No one has seriously suggested such a course of action. All agree that if we continue to adhere to the Convention, the Protocol should be ratified.

The issue therefore is between those who advocate the immediate denunciation of the Convention and those who oppose such denunciation. The pros and cons are discussed below.

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[10] Drion, pp. 176-191; note 5, supra.

1. *The Arguments for Continuing to Adhere to the Convention and Ratifying the Protocol*

Those who support the Convention and favor ratification of the Protocol point to the fact that the Convention was drafted in reliance upon time-tested principles emanating from several centuries of maritime law, and point to its durability over the years in face of changed conditions. They call attention to the advantages of uniformity in the law of international air carriage, and to the chaos of a forum shopping and the inequities of chance (limited liability or unlimited liability depending on the *lex loci*) which would result in the absence of the Convention.

They urge that the denunciation of a treaty involves more than questions of domestic law and policy and affects more than private rights. They say that an abrupt denunciation of a convention to which we have adhered for a quarter of a century would affect our relations with other countries in many other fields. They say that such action would prove valuable material for anti-American propaganda—that it would be urged as proof that we are always ready to take abritrary and unilateral action whenever it served our selfish interests.

Those who oppose denunciation of the Convention do not argue that it is a perfect document. They say however that the Protocol constitutes a major improvement, achieved without loss of international good will. They urge continuing studies with an eye to further improvements by mutual agreement, rather than precipitate unilateral action.

2. *The Arguments for Rejection of the Protocol and Denunciation of the Convention*

Those who argue against ratification of The Hague Protocol do so because of their intense opposition to the principle of limitation of liability itself and because of the devastating effect which they believe it has upon uninsured passengers and their dependents. Their feeling is that the adoption of the Protocol will simply serve to cement into our law a principle which they deem abhorrent.

They feel that their opposition to the Warsaw Convention—so intense that it has caused opposition even to the Protocol, which would lessen the severity of the Convention—has substantial foundation. They say that attorneys who have had the burden of explaining the Convention's limitation of liability to destitute beneficiaries and injured passengers find it difficult to maintain a placid attitude toward anything associated with it. They feel that the principle of limitation of carriers' liability is unjustified and that at all costs the Convention must be removed from our law.

Proponents of this position are not impressed with the "international community" argument advanced by supporters of the Convention and the Protocol. Neither the Convention nor the Protocol, they believe, is the kind of internationalism that is calculated to capture the imagination or the spirit of people overseas. They say these documents appear to be designed primarily for foreign airlines, and that the foreign lines have been the major force behind the Convention. They believe that a renunciation of the Warsaw Convention would help, rather than hinder, the position of the United States with the people of the world.

RECOMMENDATION

After balancing all the considerations on both sides of the matter, the Committee recommends that the United States ratify The Hague Protocol.

The United States has been the leading nation in the conduct of international air transportation, and United States citizens make up the largest

national contingent of international air passengers. For the benefit both of our citizens as travellers and of our airlines as international air carriers, the United States has played a leading role in formulating and obtaining international agreement upon many aspects of and many matters affecting international air carriage, from the technical aspects of air navigation aids and procedures to the reduction of delays and red-tape in the application of customs, immigration and public health controls. Often other states have gone along with the United States proposals in these matters contrary to their own national views and in deference to United States influence in this field. For the United States, therefore, to renounce international agreement in an important area affecting international air carriage—and particularly where the United States has been largely responsible for the latest version of such agreement—would deal a serious blow to United States prestige in this field and would hamper the continuing efforts of the United States to obtain wider international agreement on matters affecting international air transport and improvement in the arrangements and procedures already established. Such a consequence would injure the substantial interests of United States citizens—both carrier and patrons of air carriage—on many fronts.

Moreover, U.S. failure to ratify The Hague Protocol would undoubtedly cause the failure of sufficient other states to ratify it so that the Warsaw Convention would remain in effect as it now is so far as other countries are concerned, and U. S. citizens as patrons of the air carriers of other flags would remain confronted with the grossly inadequate limitations of liability now set by the Convention.

On the whole, therefore, it appears to be more in the interests of the United States to stimulate acceptance of the improvements which The Hague Protocol would effect in the Warsaw Convention and to continue to assert leadership toward further improvement not only in the regime of the Warsaw Convention but also in the many other phases of international air transport which lend themselves to international arrangements and understandings. We therefore urge ratification of the Protocol.

In addition, we believe it may be possible to avoid one serious disadvantage of the limitation of liability in the Warsaw Convention without disrupting international agreement or impairing U. S. influence in this field. As pointed out above, the applicability of the Warsaw Convention today does not depend on the nature of the flight during which an accident occurs—that is to say, whether such flight is international in character by reason of the location of the points of origination and destination—but rather on the contractual arrangements made by the carrier or shipper—that is, whether the ticketing is international in character. Because of this fact the Warsaw Convention has had perhaps its widest application to purely domestic U. S. flights and has produced harsh distinctions in treatment between the bereaved survivors of the passengers, some of whom have been deprived of adequate compensation because of the largely fortuitous circumstance that their particular decedent was traveling on ticketing covering a through international journey rather than on tickets separately arranged for the domestic and the international portions of his trip.

The Committee therefore also urges that the appropriate governmental authorities consider limiting the application of the Warsaw Convention and The Hague Protocol, so that these treaties will not apply to flights which both originate and terminate within the United States. Inasmuch as foreign-flag air carriers are not allowed to engage in cabotage traffic within the United States, the exclusion from the Convention of purely domestic flights would not disturb competitive relationships between the U. S. and foreign-flag carriers and would leave the Convention still applicable to the domestic portions of flights which either originated or terminated outside the United

States, whether performed by U. S.-flag or foreign-flag air carriers. Under those circumstances, equal treatment, so far as limitation of liability is concerned, would be extended to all passengers on an international flight (i.e., the Convention limits would apply) and to all passengers on a domestic flight (i.e., the Convention limits would not apply). The harsh discrimination which has resulted under the Convention as now applied would be obviated, a truer uniformity of judicial process would be achieved, and the Convention's limitations of liability would be confined to actual international carriage, which involves a smaller number of U. S. citizens and in which the passengers are presumably more aware of the risks and more likely to protect themselves and their families by the purchase of insurance.

The Committee respectfully submits the following resolutions:

RESOLVED, that the Report of the Committee on Aeronautics of The Association of the Bar of the City of New York, dated January 15, 1959, on the Warsaw Convention as amended by The Hague Protocol be approved; and further

RESOLVED, that in the opinion of this Association the prompt ratification of The Hague Protocol by this country amending the Warsaw Convention will be desirable and in the public interest, and that the President and Senate of the United States are hereby urged to take such steps as may be necessary to accomplish such ratification; and further

RESOLVED, that in the opinion of this Association it would be desirable and in the public interest for the appropriate governmental authorities to consider limiting the application of the Warsaw Convention and The Hague Protocol so that they will not apply to flights which both originate and terminate within the United States, and further

RESOLVED, that the Chairman of the Committee on Aeronautics be authorized to transmit copies of the foregoing Report of the Committee on Aeronautics and of this resolution to such Senate committees, Federal departments and officials, and other bodies and persons as he may deem appropriate.

Respectfully submitted,

COMMITTEE ON AERONAUTICS

LEANDER I. SHELLEY, *Chairman*
JOHN P. CAMPBELL
RONALD H. COHEN, *Secretary*
ASBURY H. DEYAMPERT
EGON R. GERARD
LOUIS W. GOODKIND
CLARENCE J. McGOWAN
ROSALEEN C. SKEHAN
RICHARD B. SMITH
WILLIAM G. SYMMERS

January 15, 1959

Messrs. Samuel E. Gates, Maurice Ravage, Benjamin H. Siff, Stuart M. Speiser, and Martin J. White did not concur in the foregoing Report.

The undersigned members set forth their dissenting views as follows:

The only major objection we find to the Warsaw Convention and The Hague Protocol concerns the severe limitation of liability for wrongful death and personal injury damages. Other matters covered by the Convention, such as documentation of international shipping, are not considered herein, and could well be a part of an unobjectionable treaty.

With limitation of liability, however, we feel that we must urge that the United States disapprove The Hague Protocol and withdraw from the Warsaw Convention. We do so with the further recommendation that the United States indicate its willingness to enter into a treaty containing the substance of other sections of the Warsaw Convention as amended by The Hague Protocol.

We have reached this conclusion for the following reasons:

1. There is no justification for limitation of carriers' liability for personal injuries and death damages in international private air law. Even assuming that there was a need for such a limitation in the early days of international air travel—to foster the economic growth of a then infant industry—no such need exists today. Domestic airlines in the United States have grown and prospered without any such limitation. We have examined all known rationalizations for the principle of limitation of liability in international private air law, and we find none to be persuasive.

2. On the other hand, the severe limitation of damages imposed either by the Warsaw Convention or The Hague Protocol has had and will have a devastating and catastrophic effect on the lives and welfare of the victims of airplane accidents or their dependents. Where crippling injuries are sustained or where a killed passenger is a breadwinner of a family (as often is the case in air crashes) a huge and crushing burden descends upon the injured passenger or the dependents of a deceased passenger. The loss is thus borne almost entirely by the passenger (or the community, which must bear the cost of supporting him or his destitute dependents) despite the fact that the loss was occasioned by the fault of the carrier. If the problem is approached from the standpoint of ability to withstand or bear the loss, there can be no question that, as between the passenger and the airline, the passenger is least able to bear the loss. Yet, he must do so under the Convention.

3. The Convention, with or without The Hague amendments, creates a serious inequity among passengers on purely domestic flights. There have been numerous instances of grossly disparate recoveries by passengers on the same plane who suffered similar injuries, or by the estates of deceased passengers which sustained similar losses, and these instances will undoubtedly continue. As indicated above, this is due to the fact that the operability of the Convention depends on the passenger's ticket, which may show connecting flights to foreign countries. Very often, passengers who have heard of the Warsaw Convention's damages limitation are completely unaware of its possible applicability to a crash on a domestic flight. These passengers (or their estates) are shocked to find their damages limited. They simply cannot understand the disparity between themselves and passengers (or estates of passengers) who occupied adjoining seats.

4. The Convention has had, and with The Hague Protocol will continue to have, the effect of encouraging claims and actions against aircraft and component manufacturers, airport operators, maintenance organizations, and governmental agencies despite the existence of doubtful liability on their parts.

Were there some justification for the principle of limitation of liability (or, more so, were there an impelling need for it), we would give consideration to the proposition that half a loaf is better than none, and we thus might favor an attempt, such as The Hague Protocol, to improve the Convention by amending it. The fact of the matter, however, is that limitation of liability is indefensible morally, sociologically, and economically. The "practical" considerations of international relations suggested by proponents of the Convention fall far short of convincing us that we must accept so basically bad a principle as limitation of liability. Since the principle is bad we must reject it. We believe surgery, not palliatives is the remedy, and that approval of The Hague Protocol would serve to cement an undesirable principle into our law. For these reasons we urge rejection of The Hague Protocol and immediate withdrawal by the United States from the Warsaw Convention.

MAURICE RAVAGE
BENJAMIN H. SIFF
STUART M. SPEISER

January 15, 1959

INTERNATIONAL REVIEW

Compiled by JULIAN GAZDIK in cooperation with RODERICK HEITMEYER (IATA), DR. G. F. FITZGERALD and MR. A. M. LESTER (ICAO) and MRS. M. A. DOWLING.

I. INTERNATIONAL CIVIL AVIATION ORGANIZATION
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Draft Convention on Offenses and Certain Other Acts Occurring on Board Aircraft
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II. INTERNATIONAL AIR TRANSPORT ASSOCIATION
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III. UNITED NATIONS
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IV. INTERNATIONAL LABOR OFFICE
Resumé of Projected Ad Hoc Civil Aviation Meeting

V. INTERNATIONAL CHAMBER OF COMMERCE
Discussion of Air Transport as a Means of Economic Development

I. INTERNATIONAL CIVIL AVIATION ORGANIZATION

12th ASSEMBLY SESSION, JUNE 16-JULY 9, 1959

GENERAL COMMENTARY*

The International Civil Aviation Organization held its 12th Assembly Session in San Diego from 16th June to 9th July, 1959. The scope of this paper is confined to a brief outline of the main results of this Assembly that fall under the heading of "economic." All but the first of the subjects dealt with below were discussed by the Economic Commission of the Assembly. A total of forty-three of the seventy-three contracting States of ICAO were represented at one or more meetings of this Commission, as were observers from one non-contracting State—the U.S.S.R.—and the following five international organizations: United Nations (UN), International Air Transport Association (IATA), International Chamber of Commerce (ICC), Fédération internationale des Transports Aérien Privés (FITAP) and Institut du Transport Aérien (ITA).

I. Fifteen Year Forecast of Major Trends and Developments in International Civil Aviation

One of the more important matters dealt with by the San Diego Assembly concerned a proposed fifteen year forecast of major trends and developments in international civil aviation. The Council had put before the Assembly a

* By Roderick Heitmeyer

paper giving its ideas of the purpose, scope and general plan of the forecast with a time schedule for the proposed study. The emphasis of the proposed study was, however, entirely changed during the discussions in the Executive Committee of the Assembly. Accordingly, paragraph 68 of the Executive Committee Report reads as follows:

> "The three delegates commenting on the time schedule expressed the view that at least the first edition of the forecast should be completed by the end of 1960 at the latest. Then the debate took a new turn with a statement by the Delegate of the United Kingdom suggesting a radical change in emphasis. The Council had envisaged the forecast chiefly as an aid to States in long-term planning for the establishment and expansion of air carrier enterprises, for the construction of airports and air navigation facilities, and for the development of the tourist trade and of industries largely dependent upon air transport. He urged that the first part of it, at least—which should be completed by the end of August 1960 at the latest—should be a study of the probable main economic and social consequences of fundamental changes in aircraft design, on the basis of which governments could, in consultation with aircraft manufacturers, airlines and airport authorities, attempt to develop a co-ordinated policy for the future instead of merely assessing what was likely to happen, resigning themselves to it, and trying to improvise at the last moment ways of meeting it. The next speaker, the Delegate of Denmark, took a similar line, saying that in the aircraft industry the techniques in the saddle today, and even more the techniques of tomorrow, were based largely on military needs and experience, with cost as a secondary consideration, and might produce equipment that would be outstanding from a technical standpoint but of doubtful value to civil aviation. He maintained that ICAO should not be content merely with attempting to forecast developments that someone else would determine; it should try, in collaboration with aircraft manufacturers and airlines to guide these developments along lines it considered to be the best interests of the public, airlines and civil aviation authorities. At the Committee's request the two delegations undertook to present their views in writing, and subsequently the United Kingdom Delegation presented, on behalf of the Delegations of Australia, Belgium, Denmark, and the Federal Republic of Germany as well as themselves."

Before this resolution was actually considered in the Executive Committee, certain changes to it were agreed to by a number of delegations, and the resolution with these changes finally came up for consideration. However, the Executive Committee, by a divided vote, accepted the resolution as originally proposed and disapproved the suggested amended resolution. This action was approved by the final Plenary Session as Resolution A12-6. It will be noted that the ICAO Council is directed as a matter of urgency to undertake a preliminary study of the prospects of the development of supersonic civil aircraft, to be completed not later than September 30th, 1960. Para. 3(h) of the Resolution directs that the more general work on the proposed fifteen year forecast is to continue only in so far as it does not impair the execution of the preliminary study, and that future work thereafter on the proposed forecast will be decided after receipt of comments by Contracting States based on the preliminary study. The text of Resolution A12-6 reads as follows:

> A12-6: *Instructions to the Council with respect to Preparation of the Fifteen-year Forecast of Major Trends and Developments in In-*

ternational Civil Aviation Requested of the Council in Clause 3 of Resolution A10-7

WHEREAS a close correlation between the investment proposals and planning generally of governments, airport authorities and airlines is essential if international air transport is to realize its maximum economic and social justification;

WHEREAS any radical change in aircraft types or any major re-equipment program by world airlines is bound to create technical, economic and social consequences of the greatest importance; and

WHEREAS such consequences need to be forecast and understood in ample time to enable constructive as well as properly correlated policies to be evolved whereby these consequences may be both planned for and influenced to the best overall advantage of international civil aviation:

THE ASSEMBLY

(1) REAFFIRMS the need for continuing work on forecasting major trends and developments in international civil aviation as expressed in Resolution A10-7; but

(2) CONSIDERS the proposals of the Council for pursuing this study require modification in the light of experience of the turbo-jet aircraft and of the most recent information on the technological advances in aircraft design; and

(3) THEREFORE RESOLVES

(a) that the Council should, at its immediately forthcoming Session, put in hand as a matter of urgency a preliminary study into prospects of the development of supersonic civil aircraft and their availability for commercial introduction within the period ending about 1975, with the object of transmitting such a Report to Contracting States for information and guidance, with such comments thereon as the Council may think advisable;

(b) that this study should assess, necessarily in broad and incomplete terms only, the chief probable, technical, economic and social consequences of any such development, on a comparative basis, e.g. comparing the consequences of introducing a supersonic aircraft into commercial service in, say, 1965, with the consequences of introducing it in, say, 1970;

(c) that the foregoing assessment should in particular comment on the comparative consequences (again necessarily in broad and incomplete terms) for the investment and amortization problems of governments, airlines and airport authorities, after taking due account of any probable economic advantages of new aircraft types;

(d) that this preliminary study should also include a broad assessment of the chief probable noise, land use and similar social problems likely to flow from the introduction of supersonic aircraft during the period under review;

(e) that this preliminary study should be completed and the Council's report thereof issued not later than September 30, 1960;

(f) that the Council be invited, when carrying out this Resolution, to give authority to the President of the Council to decide whether or not parts of this preliminary study should, in the

interests of the most economical, speedy and authoritative results, be entrusted to outside consultants or to appropriate outside institutions, foundations, and the like; and, if he considers such a course desirable, to decide what consultant or institutions should be invited to undertake the work in question;

(g) that in addition to consulting such individual airport authorities, airlines, aircraft and aero engine manufacturers, and others as they may think fit, the Council should also formally seek the views of IATA and such other representative international bodies as they may feel appropriate; and, further, immediately invite Contracting States to submit, not later than January 31, 1960, papers embodying

(i) Any available information, statistical data (or advice as to other sources of same), which Contracting States consider relevant or desirable to submit as contributory to this study;

(ii) Contracting States' own present views as to the likely technical, economic and social consequences of probable development in aircraft design, so far as they may now be forecast;

(iii) Contracting States' own present views as to any follow-up action which provisionally it seems likely to them might usefully be undertaken by ICAO or otherwise, in the light of the report on this preliminary study;

(h) that more general work on the fifteen-year forecast required by Resolution A10-7 should continue only in so far as it does not impair the rapid, economical and efficient execution of this preliminary study and that the nature and method of its further prosecution shall be decided after receipt of comments by Contracting States on the report on the preliminary study.

II. *Commercial Rights for International Air Transport*

This subject was dealt with in the Economic Commission of the Assembly within the context of the general review of work on economic matters since the last major Assembly, and the anticipated work program for the next three years.

The Commission considered the prospects of, and methods for achieving further international agreement on commercial rights in international air transport. It was noted that, in general, the Organization's work in commercial rights since 1956 had been closely related to the activities of the European Civil Aviation Conference in accordance with a resolution of the 10th Assembly. It was also agreed that this close collaboration should continue.

The progress made by ECAC in developing measures of co-operation and liberalization was noted, and the possibility of extending these on a world-wide basis was considered. A majority of the Commission rejected two proposals which were drafted along the lines of recommendations previously adopted by ECAC. These dealt with the elimination of fifth freedom restrictions in bilateral agreements as to scheduled freight services. A suggestion that an international conference on the exchange of commercial rights might be held in the 1960-1962 period was also rejected by the majority.

As the world-wide approach to commercial rights was found to be impractical for the present, the Commission agreed that the main efforts of the Organization in this field should be concentrated on the regional approach. A resolution was eventually adopted and approved in the Plenary

Session as A12-18, urging that the Council continue to give co-operation to the European Civil Aviation Conference and to keep in close touch with other regional movements tending toward international co-operation in the field of commercial rights. The same resolution in para. 4 directs the Council to continue the comparative and analytical study of the provisions of bilateral agreements, and the study of the standard provisions approach to multilateral agreements taking account of the standard administrative and technical clauses adopted by the Third Session of ECAC (ECAC Recommendation 38/1959).

Resolution A12-18 thus reads as follows:

A12-18: *Commercial rights in international air transport*

WHEREAS it is becoming increasingly important in the new era of air transport that is beginning that the contracting States of ICAO shall maintain close working relationships with each other in their air transport policies; and

WHEREAS the European Civil Aviation Conference has made some progress in developing measures of cooperation and liberalization and partial forms of multilateralism in relation to commercial rights for certain categories of international air transport; and

WHEREAS there is need for study of the results of those measures and for more fundamental examination of the problems raised before any attempt can be made to adopt similar or other measures for the contracting States of ICAO as a whole;

THE ASSEMBLY RESOLVES:

(1) That the Council continue to give the cooperation requested by the European Civil Aviation Conference in this field in accordance with Resolution A10-5;

(2) That the Council should keep in close touch with other regional movements tending toward international cooperation in this field and should give sympathetic consideration to requests received from other regional bodies, now or hereafter established, for assistance similar to that now given ECAC;

(3) That the Council should keep under close review the work of ECAC and of other regional bodies in their examination and development of measures of cooperation, including partial multilateralism, and the results of these measures, in order to see whether similar or other measures should at the appropriate time be recommended to States for application on a wider basis;

(4) That the Council should continue the comparative and analytical study of the provisions of bilateral agreements and the study of the standard provisions approach to multilateral agreements taking account of the standard administrative and technical clauses adopted by the Third Session of ECAC (ECAC Recommendation 38/1959); and

(5) That contracting States should inform Council of any new developments in international cooperation with respect to commercial rights in their region and that such information should be communicated by Council to all contracting States.

III. *Study of Charges for Airports and Air Navigation Facilities*

The Economic Commission discussed the effect of Resolution A2-14 under which the Council had been instructed by the Second Assembly to study charges for airports and route air navigation facilities. The majority of the

Commission felt that the study as described in Resolution A2-14 could be regarded as having been satisfactorily completed and that any further work in the field should only be undertaken if new and important problems arose, which would be unlikely to happen before 1962. At that time the situation would be fully documented for the Assembly's consideration.

IV. *Study of the Economic Implications of Long-Range Jet Aircraft*

The Economic Commission approved a suggestion of the Council that it should continue to study the economic implications which had been undertaken pursuant to Resolution A10-34, and had resulted in the publication in June, 1958, of Doc. 7894-C/907 entitled "The Economic Implications of the Introduction into Service of Long-Range Jet Aircraft." The suggestion was made in the Commission that this study should be closely co-ordinated with the forecast of trends and developments in international civil aviation over the next fifteen years mentioned above.

Three separate studies received Assembly approval and will be initiated by Council: "The study of the advantages brought by air transport," "Study of inclusive tours" and "Study of the systematic use of civil aviation for aerial work."

V. *Study of the Advantages Brought by Air Transport*

The action of the Economic Commission in this matter is thus stated in the report of the Commission as later approved by the Plenary Session:

> "The Commission considered the study of the advantages brought by air transport proposed by the Council and determined that, while a few of the members doubted the usefulness of the undertaking, the majority found it to be of value. It was considered that the ideas contained in the basic document, A12-WP/25, were broadly satisfactory, but they needed to be qualified to ensure that the study would be both useful and economical to carry out. It should explore and take account of other studies already completed in this field. It was emphasized that in order to be useful the study should be factual rather than theoretical, should be largely concerned with the broad economic and financial aspects of the subject, and should be forward looking as well as historical. The study should be presented in an objective way from which deductions could be drawn that might assist Contracting States in formulating their policy.
>
> "The Commission agreed that in form the study should contain a general survey with some quantitative material for illustrative purposes. More detailed analyses should be focussed on a small representative selection of different types of community such as developed and underdeveloped economies, remote areas with inadequate surface transport, and possibly cities."

VI. *Study of Inclusive Tours*

The action of the Economic Commission in this matter is thus stated in the report of that Commission as later approved by the Plenary Session:

> "The Commission approved the intention of the Council, as outlined in A12-WP/26, to undertake a study of inclusive tours. The action of the European Civil Aviation Conference in calling for a similar study (ECAC Recommendation No. 44, 1959) was noted as indicating the growing importance of this category of air transport. On the question of procedure in carrying out the study, the Commission suggested that it should be begun after the completion of the study of the advantages brought by air transport, thus allowing time also for the completion of the ECAC study of inclusive tours. The ICAO Secretariat, which would

be responsible for the studies in question and which would thus, as a matter of course, ensure that there would be no duplication, could make use of the material in the ECAC studies, applying it in the broader field of ICAO's general endeavor."

VII. *Study of the Systematic Use of Civil Aviation for Aerial Work*

The action of the Economic Commission in this matter is thus stated in the report of that Commission as later approved by the Plenary Session:

"The Commission approved the intention of the Council, as outlined in A12-WP/27, to undertake a study of the systematic use of civil aviation for aerial work. The connection between this study and that on the advantages brought by air transport was noted, but it was understood that the present study would be concerned with that part of civil aviation (excluding private and pleasure flying) where aircraft were utilized primarily for purposes other than transport. As regards priority for the different studies, the Commission agreed that the study of aerial work would be undertaken after the studies of the advantages brought by air transport and inclusive tours."

VIII. *Statistical Assistance to Governments*

The Economic Commission noted that the ICAO Secretariat had found it possible to visit a certain number of Contracting States to give advice and assistance on the collection of air transport statistics, but it was felt that more needed to be done in this way. A substantial number of states were still not filing satisfactory statistics, or were filing them excessively late, and the proposal made in the Third Session of the Statistics Division to hold small local meetings was raised again. The ideas of these meetings would be that governments and airline officials could meet with members of the ICAO Secretariat, or with officials of other governments, and airlines with the necessary experience, who could explain how ICAO's statistical requirements could be satisfied with a minimum of trouble and expense. The Commission was satisfied that the cost to the Organization would be small in comparison with the results that might be achieved. A resolution was recommended, and later adopted in Plenary Session, recommending "that Council ascertain from enquiries to, or requests from, States where small local and regional meetings of the "workshop" type are desired, and make arrangements for such meetings in suitable places at the earliest practicable time."

IX. *The Study of Origin and Destination Statistics*

Discussion of the subject of origin and destination statistics in the Economic Commission brought out strong differences of opinion in relation to the Council's proposals for the study of methods for the collection of this type of data by a special panel of experts recommended by the Third Session of the ICAO Statistics Division. These differences of opinion centered on the question of whether specific needs for such data had been defined and the speed with which the work of the panel of experts should be carried out.

A group of delegates, supporting a draft resolution proposed by Denmark, believed that the specific needs of ICAO for origin and destination statistics had been neither demonstrated nor defined and that there should be further studies before any action was taken on the recommendation of the panel. Some of the group also believed that statistics of this kind might be to the advantage of some States at the expense of others and would, in any event, be complicated and expensive to collect and analyze. The group felt strongly that great caution was necessary and that the Council should take no action on any proposals produced by the Panel until the whole question had been presented again to the Assembly. Also, that in the meantime the utility of

origin and destination to the Organization and Contracting States in general should be more carefully examined.

Another group of delegates considered that the utility of this kind of data had been generally agreed upon, after considerable study by the Organization and consultation with Contracting States. The next question was whether a satisfactory and reasonably economical method of collecting this data could be devised. They were of the opinion that the Council, in establishing the Panel to pursue this question, had taken a reasonable and necesesary step and further action should not be delayed. When the Panel had reported in due course on possible methods and cost involved, Council would have to weigh all the factors, including those of usefulness, practicability and cost, and come to a decision. It would undoubtedly consult States before doing so, and it was therefore undesirable and unnecessary to postpone further action until after consideration by the Assembly, as would be the case if the proposed resolution were adopted.

The proposed resolution was adopted in the Commission by a vote of ten in favor, eight against, and four abstentions. It read as follows:

THE STUDY OF ORIGIN AND DESTINATION STATISTICS

WHEREAS ICAO has not defined any specific and urgent needs for origin and destination statistics;

WHEREAS at the Twelfth Session of the Assembly a deep cleavage of opinion among member States as to the usefulness of origin and destination statistics became evident;

WHEREAS the activities of ICAO in the origin and destination field are likely to lead to considerable costs for ICAO, governments and airlines;

THE ASSEMBLY DIRECTS the Council to study and define the specific needs of the organization for origin and destination statistics and that further action by the Council on this subject—apart from making arrangements for the activities of the Origin and Destination Statistics Panel—shall be kept in abeyance until the Assembly in the light of the information requested from Council decides upon the matter.

The resolution quoted above which had been adopted by the Economic Commission was presented at the final Plenary Session of the Assembly but was not accepted. It would therefore appear that the ICAO Council is now free to act as it sees fit on such recommendations as may be made to it hereafter by the special Panel of Experts, which will hold its first meeting in October, 1959.

X. *General Program in the Facilitation Field*

The Economic Commission reviewed the activities in the Facilitation field for the past three years. It was agreed that although substantial progress had been made, a great deal still remained to be done. The Commission gave emphasis to the introduction and widespread operation of jet aircraft. It was observed that this would require special attention from a Facilitation point of view, since the greatly increased speeds and larger capacity of these aircraft made them particularly sensitive to unnecessary delays on the ground. It was resolved that special efforts will be required to clear large jet aircraft of their loads with the minimum of delay, and develop faster handling techniques for air cargo. The Commission looked to the forthcoming Fifth Session of the ICAO Facilitation Division for special attention in this regard and urged States to consider, as soon as possible,

what desirable improvements were necessary in Annex 9 and the FAL program generally.

The Commission further resolved that each Contracting State should critically examine any differences which exist in its territory between its national regulations and practices and the provisions of Annex 9, and to make special efforts to eliminate such differences at the earliest practical moment. Contracting States are also urged to notify ICAO each year of the status of implementation of Annex 9 in their territories.

REPORT OF THE LEGAL COMMISSION TO THE 12th ASSEMBLY

During the month of June, 1959, the Legal Commission held seven meetings prior to the 12th Session of the Assembly, at San Diego, California. Delegates from 32 contracting States attended the meetings; Afghanistan, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, Ecuador, Federal Republic of Germany, France, Guatemala, India, Ireland, Japan, Lebanon, Mexico, Netherlands, New Zealand, Norway, Peru, Philippines, Portugal, Spain, Switzerland, Thailand, Turkey, Union of South Africa, United Kingdom, United States of America, Venezuela, Viet Nam.

The Commission undertook a general examination of the subjects in the Work Program of the Legal Committee prior to the Twelfth Session of the Assembly.

Those subjects were as follows, arranged according to the degree of urgency, into categories A and B:

Part A. Subjects on the current program:

Legal status of the aircraft

Legal status of the aircraft commander

Draft convention on aerial collisions

Part B. Subjects on the non-current work program:

Study of a system of guarantees for the payment of compensation in pursuance of the Warsaw Convention

Study with a view to unifying the rules relating to procedure in cases arising under conventions on air law and of the rules of procedure applicable to the execution of judgments.

Research in regard to measures for promoting the uniform interpretation of international private air law conventions, and research in regard to measures to be taken in order to ensure (a) the international authority of judgments by competent tribunals on conventions in force on air matters and (b) the distribution and allocation of awards in pursuance of such conventions

Global limitation of liability of the operator

Consideration of problems concerning assistance on sea and land and remuneration therefor

Problems of nationality and registration of aircraft operated by international agencies.

The Commission's attention was drawn to the following subjects which were not included in the Work Program:

(i) Hire, Charter and Interchange of Aircraft: The Legal Committee prepared, at Tokyo, in 1957, the Draft Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier.

(ii) Carriage of nuclear material by air.

(iii) Problems involved in the peaceful uses of outer space.

Having made an examination of the items mentioned above the Commission undertook to draw up a Work Program, taking into account developments relating to these subjects, their importance and urgency.

The Commission drew up a program dividing the subjects retained for study by the Legal Committee into two categories:

A. Subjects on the Work Program on which work should be done at present.

B. Subjects on the Work Program on which no work should be undertaken or directed by the Legal Committee, unless and until a report had been submitted to the Council by the Secretary General or by the Chairman of the Legal Committee indicating the need for such work and Council had approved, or unless the Assembly or Council otherwise directed that active work should be undertaken.

The Commission decided to include the following items in Part A of the Work Program with the following order of priority:

(i) *Legal Status of the Aircraft*

The Commission noted that the Legal Committee would be preparing, during its Twelfth Session, a draft convention on offenses and related acts on board aircraft. Consequently, the Legal Committee would, undoubtedly, at that session, make recommendations on the action to be taken in respect of that draft convention.

(ii) *Hire, Charter and Interchange of Aircraft*

The Commission considered that this subject should be reinstated to Part A of the Work Program of the Legal Committee with a high priority and, in this regard, decided to recommend that the Assembly adopt the draft resolution appearing in Appendix "A" and further that, in view of the work already done on this subject by the Legal Committee, the order of priority set out above should not prejudice the holding of a diplomatic conference to consider this item prior to the holding of such a conference to consider other items in Part A.

(iii) *Draft Convention on Aerial Collisions*

The Commission noted that, since the Draft Convention on Aerial Collisions had been drawn up by the Legal Committee in 1954, there had been many new problems in aviation affecting this subject. It also considered the desirability of having the draft convention re-examined with a view to determining if there was any possible solution for these problems and for problems raised by the present draft that might render a revised draft acceptable to a greater number of States.

Accordingly, the Commission considered it desirable that the Legal Committee re-examine the Draft Convention on Aerial Collisions as soon as possible and with a high priority, even if this might mean the convening of two sessions of the Committee during one year. The Commission, having considered whether the draft convention should be examined initially by a subcommittee, decided to refer the draft convention to the Legal Committee for its action.

(iv) *Legal Status of the Aircraft Commander*

The Commission noted that certain aspects of the question of the legal status of the aircraft commander were being dealt with by the Legal Committee in the course of the study of the question of the legal status of the aircraft. The Commission decided, in so far as other aspects of the question of the legal status of the aircraft commander were concerned, to recommend retention of the item in Part A of the Work Program.

Carriage of Nuclear Material by Air[1]

The Commission was informed that conventions on the carriage of nuclear material were being prepared by the Organization for European Economic Cooperation and the International Atomic Energy Agency. It considered the possibility that any such conventions might have effect with respect to questions governed by certain private international air law conventions, such as the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929) and The Hague Protocol to Amend that Convention (1955), and the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1952).

Noting that ICAO had primary responsibility in the field of international civil aviation, including legal questions arising in relation to the carriage of nuclear material by air, the Commission considered it to be of some urgency that the Organization take an active interest in the development of any conventions on the carriage of nuclear material in so far as they might concern the carriage of nuclear material by air.

In view of the foregoing, the Commission was of the opinion that:

(a) The subject "Carriage of Nuclear Material by Air" should be placed in Part A of the Work Program of the Legal Committee;

(b) The Chairman of the Legal Committee should appoint a rapporteur to study the said subject and, in particular, report on the relationship between any conventions on the carriage of nuclear material now being studied, and the relevant international air law questions;

(c) The Secretariat should follow closely the further developments regarding the preparation and finalization of conventions on the carriage of nuclear material within the Organization for European Economic Cooperation and the International Atomic Energy Agency and should inform these bodies of the action taken by the Assembly in regard to the carriage of nuclear material by communicating to them the text hereof appearing under the heading "Carriage of Nuclear Material by Air."

The Commission decided to recommend for retention in Part B of the Work Program of the Legal Committee the items listed under the heading "Part B" above.

In regard to the first and second items in Part B, it was decided to recommend to the Legal Committee the appointment of rapporteurs to pursue the study of such items.

Problems Involved in the Peaceful Uses of Outer Space

The Commission noted that the United Nations had constituted an *Ad Hoc* Committee on the Peaceful Uses of Outer Space, and that the Committee had been, and was, in the process of studying the various aspects of the problems involved in the peaceful uses of outer space, including both legal and technical matters.

The Commission was aware of the fact that under the existing agreement between the United Nations and the International Civil Aviation Organization (Doc. 7970), there was provision for consultation by the United Nations with ICAO as one of its specialized agencies. The Commission was confident that, pursuant to such Agreement, any matters which might arise during the consideration of the problems of the peaceful uses of outer space in the United Nations which related to the specialized competence of ICAO, would be referred to ICAO for its consideration.

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[1] It was decided not to rank this item in the order of priority as its ranking would finally depend on action taken by other international agencies.

In view of the foregoing, the Commission considered it unnecessary, at this juncture, to include the study of the problems arising in this matter in the Work Program of the Legal Committee.

Plans for Finalizing Draft Conventions Prepared by the Legal Committee

The Commission decided to recommend that, in view of the decisions which it had taken in regard to items for inclusion in Part A of the Work Program of the Legal Committee, and in respect of the action to be taken in regard to such items, the forecast schedule of legal meetings during the period 1960-1962 be as follows, subject to budgetary provisions:

1960

—A meeting of a Subcommittee on the Hire, Charter and Interchange of Aircraft

—If necessary, two full sessions of the Legal Committee to consider the item entitled "Hire, Charter and Interchange of Aircraft" and the item entitled "Draft Convention on Aerial Collisions." The former item involved, in effect, further consideration of the Draft Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier prepared by the Legal Committee at its Eleventh Session (Tokyo, 1957). In this connection, reference is made also to the draft Resolution appearing in Appendix "A" to this Report.

1961

—A meeting of a subcommittee on a subject included in Part A of the Work Program of the Legal Committee.

—A probable diplomatic conference to finalize the item "Hire, Charter and Interchange of Aircraft," it being understood that, dependent upon the progress of work on other air law conventions, the Council might wish to examine the possibility of having such a conference consider more than one subject.

1962

—A meeting of a subcommittee on a subject included in Part A of the Work Program of the Legal Committee.

—A session of the Legal Committee or a diplomatic conference to consider a subject included in Part A of the Work Program of the Legal Committee.

The Commission, having noted the slow progress that had been made in achieving draft conventions on international air law, recommended that the Council be requested to consider this matter in order to find ways and means of speeding up progress of the legal work of the Organization.

Proposed Preparation of a Repertory of Practice of the Assembly, Council, and Other Organs in Relation to the Convention on International Civil Aviation

In regard to this item, the Commission considered it desirable that the Secretariat be authorized to prepare a sample of the proposed Repertory based upon two or three articles of the Convention on International Civil Aviation, covering a relatively short period of time, such as two or three years, it being understood that the Secretariat was authorized to select those articles of the Convention and that period of time which, in its best judgment, would produce the best sample with the least effort.

The foregoing authorization was conditioned upon the performance of the work without any additional cost in personal services over and above those allocated to the Secretariat under the applicable budget.

The Secretariat should transmit the completed sample to the Council for reference to the other representative bodies of the Organization for their opinion as to the utility of the material. At the same time, the Secretariat should report to the Council its estimate of the additional cost, if any, of completing the entire Repertory of Practice within five years.

If the Council, after receipt and consideration of the opinions of the representative bodies, was of the opinion that the Repertory would serve a useful purpose, it should refer the matter with its recommendations to the next succeeding Assembly.

Status of International Conventions on Air Law

The Commission noted that, while there had been some progress in obtaining increased participation of States in international conventions on air law, it was desirable to obtain more extensive participation therein. Accordingly, it decided to recommend that the Assembly adopt the draft resolution appearing in Appendix "B."

Resolutions of the International Conference on Private Air Law Held at The Hague in September 1955

In taking its decision to recommend no change in Part B of the Work Program of the Legal Committee, the Commission, in effect, recommended that Resolutions B, C and E of The Hague Conference (September 1955) be retained in Part B, since the subject matter of these resolutions was dealt with respectively in the first, second and third items listed in Part B. At the same time, as already indicated, the Commission decided to recommend the appointment of rapporteurs in respect of the first and second items in Part B aforesaid.

APPENDIX "A"

WHEREAS a Draft Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier prepared by the Legal Committee as the result of its work on the subject entitled "Hire, Charter and Interchange of Aircraft" has been submitted by the Legal Committee to the Council, circulated to the member States by the Council for their comments, and such comments have been transmitted to the Organization for consideration by the Council;

WHEREAS the Council has not yet considered such comments and thus, of necessity, has not determined that a diplomatic conference should be called to consider the draft Convention;

WHEREAS it is necessary to study the aforesaid comments;

WHEREAS rapid developments in the field of hire, charter and interchange in recent months indicate the desirability of further limited examination of the subject matter prior to the calling of a diplomatic conference;

WHEREAS the proposed Convention deals with matters of urgency and importance to civil aviation and thus requires that the Organization proceed as rapidly as possible consistent with a sound solution to the problems to be solved; and

WHEREAS further limited examination as aforesaid would assist the diplomatic conference to prepare a final Convention more quickly and efficiently,

THE ASSEMBLY:

1. RESOLVES that the subject entitled "Hire, Charter and Interchange of Aircraft" be reinstated in Part A of the Work Program of the Legal Committee.
2. INSTRUCTS the Legal Committee to reconstitute the Subcommittee on Hire, Charter and Interchange of Aircraft for the limited purpose of considering the comments received from the States and international organizations, with particular attention to Article V of the draft Convention, and making recommendations and suggestions concerning those comments.
3. DIRECTS that the report of the Subcommittee be filed with the Legal Committee for such further action thereon as the Legal Committee may determine.
4. REQUESTS that the Legal Committee make every effort to complete its consideration of these matters and submit its report to the Council during the year 1960.

APPENDIX "B"

THE ASSEMBLY

RECALLING that, in Resolution A10-39, it had expressed the hope that the States concerned would participate in international conventions on private air law which have already been signed, including The Hague Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 (opened for signature on 28 September 1955),

NOTING that, since the adoption of that Resolution, there has been some progress in obtaining increased participation in the aforesaid conventions,

CONSIDERING, however, that it is desirable that such participation should be more extensive,

EXPRESSES THE HOPE that the States concerned will participate in the aforesaid conventions (including the Hague Protocol to Amend the Warsaw Convention) as soon as possible;

REQUESTS the Council, with a view to increased participation as aforesaid, to invite States once again to ratify or adhere to the conventions concerned;

CONSIDERS IT DESIRABLE that, if a satisfactory increase in the participation of States in the conventions aforementioned is not obtained within the near future, the Council should endeavor to ascertain the reasons for the lack of participation of States in the conventions, and, in the light of these reasons, decide whether or not the situation thus disclosed warrants consideration by the competent representative bodies of the Organization with a view to determining what action should be taken in respect of the conventions.

DRAFT CONVENTION ON OFFENSES AND CERTAIN OTHER ACTS OCCURRING ON BOARD AIRCRAFT*

The Legal Committee of ICAO, at its Munich meeting held between August 18th and September 4th, 1959, considered the subject of the Legal Status of Aircraft.

As the result of this meeting, a new Draft Convention was completed as follows:

* Provisional title.

ARTICLE 1

1. This Convention shall apply in respect of the offenses and other acts hereinafter mentioned when committed or done by a person on board any civil aircraft registered in a Contracting State, while that aircraft is:

(a) in flight in the airspace of a State other than the State of registration; or

(b) in flight between two points of which at least one is outside the State of registration; or

(c) in flight in the airspace of the State of registration if a subsequent landing is made in another Contracting State with the said person still on board; or

(d) on the surface of the high seas or of any other area outside the territory of any State.

2. For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of actual take-off until the moment when the landing run ends.

3. This Convention shall not apply to State aicraft. Aircraft used in military, customs and police services shall be deemed to be State aircraft; however, any aircraft engaged in the carriage of passengers, cargo or mail for remuneration or hire shall be subject to this Convention.

ARTICLE 2

Offenses, for the purposes of this Convention, are offenses punishable by the penal laws of a Contracting State competent in accordance with Article 3.

ARTICLE 3

1. Independently of any other applicable jurisdiction, the State of registration of the aircraft is competent to exercise jurisdiction over offenses committed on board the aircraft.

2. The criminal jurisdiction of a State in whose airspace the offense was committed, if such State is not the State of registration of the aircraft or the State where the aicraft lands, shall not be exercised in connection with any offense committed on an aircraft in flight, except in the following cases:

(a) if the offense has effect on the territory of such State;

(b) if the offense has been committed by or against a national of such State;

(c) if the offense is against the national security of such State;

(d) if the offense consists of a breach of any rules and regulations relating to the flight and maneuver of aircraft in force in such State;

(e) if the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under an international agreement.

ARTICLE 4

Where a final judgment has been rendered by the authorities of one Contracting State in respect of a person for an offense, such person shall not be prosecuted by the authorities of another Contracting State for the same act, if he was acquitted or if, in the case of a conviction, the sentence was remitted or fully executed, or if the time for the execution of the sentence has expired, unless he is a national of such State and its laws permit such further trial.

ARTICLE 5

1. When the aircraft commander has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an act

which, whether or not it is an offense, may or does jeopardize the safety of the aircraft, or persons or property therein, or which jeopardizes good order and discipline on board, the aircraft commander may impose upon such person measures of restraint which seem necessary:

(a) to protect the safety of the aircraft, or persons or property therein; or

(b) to maintain good order and discipline on board; or

(c) to enable him to deliver the person so restrained to competent authorities.

2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or persons or property therein.

3. Such powers of the aircraft commander, crew members and passengers and the powers conferred by Article 6 may be exercised with respect to acts, whether offenses or not, of the kind described in paragraph 1 of this Article when committed between the moment when embarkation on board has been completed and the moment when disembarkation has commenced if the flight is one of those described in Article 1, paragraph 1. In the case of a forced landing outside an airport, such powers of the aircraft commander shall continue as to acts committed on board until competent authorities take over the responsibility for the aircraft, persons and property on board.

4. For the purposes of this Convention, the aircraft commander is the individual on board an aircraft who is responsible for the operation and safety of that aircraft.

ARTICLE 6

1. The aircraft commander may disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed a serious offense on board the aircraft, or has committed, or is about to commit, on board the aircraft an act which, whether or not it is an offense, may or does jeopardize the safety of the aircraft, or persons or property therein, or which jeopardizes good order and discipline on board.

2. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed a serious offense on board the aircraft.

ARTICLE 7

The aircraft commander shall transmit to the authorities to whom any suspected offender is delivered pursuant to the provisions of Article 6, paragraph 2, relevant evidence and information which, in accordance with the law of the State of registration of the aircraft, are lawfully in his possession.

ARTICLE 8

1. The aircraft commander shall report to the competent authorities of the State of registration of the aircraft the fact that an apparent offense has occurred on board, any restraint of any person, and any other action taken pursuant to this Convention, in such manner as the State of registration may require.

2. The aircraft commander shall, as soon as practicable, notify the competent authorities of any Contracting State in which the aircraft lands of the

fact that an apparent offense or an act endangering the safety of the aircraft or persons or property therein has occurred and that the suspected person is on board.

ARTICLE 9

Neither the aircraft commander, other members of the crew, a passenger, the owner or operator of the aircraft nor the person on whose behalf the flight was performed, shall be liable in any proceedings brought in respect either of any reasonable restraint imposed under the circumstances stated in Article 5 or of the reasonable performance of other action authorized by Articles 6, 7 and 8.

ARTICLE 10

1. Any Contracting State shall allow the Commander of an aircraft registered in another Contracting State to disembark any person pursuant to Article 6, paragraph 1.

2. Any Contracting State shall take custody of any person whom the aircraft Commander delivers pursuant to Article 6, paragraph 2, upon being satisfied that the circumstances warrant taking such person into custody and the Contracting State assumes such obligation pursuant to its regulations and laws. If the circumstances involve an offense the State having custody shall promptly notify any State in whose territorial airspace the offense was committed, the State of registration of the aircraft and the State of nationality of the suspected offender of the nature of the apparent offense and the fact that the suspected offender is in custody.

3. If the State having custody has no jurisdiction over the offense or does not wish to exercise such jurisdiction, it shall make a preliminary investigation of the apparent offense and shall report its findings and such statements or other evidence as it may obtain to any State in whose territorial airspace the offense was committed, the State of registration of the aircraft and the State of nationality of the suspected offender.

ARTICLE 11

In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offense committed on board an aircraft the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo.

LEGAL ASPECTS OF OFFENSES AND CERTAIN OTHER ACTS OCCURRING ON BOARD AIRCRAFT*

INTRODUCTION

There are many jurisdictions[2] in the world legislating in connection with offenses, and when typical legislations of these jurisdictions are examined, the absence of a uniform basis for bringing the aerial offender to justice is striking.[3] Moreover, given the high speed of modern aircraft, an offense on board an aircraft may occur and produce effect in several States and each

* By Gerald F. FitzGerald, Senior Legal Officer, ICAO. This is an expanded and revised version of a talk given at Rome before the Centro per lo Sviluppo dei Trasporti aerei on Friday, 4 September 1959.

[2] See International Law Association, New York University Conference (1958), Air Law, Crimes in Aircraft, Status of Aircraft with reference to Criminal Law for Aircraft, Report, Case Materials, Draft Texts, 5 where it is stated that: "Taking the entire globe together, there are probably at least 250 state-national-provincial versions of criminal law now in existence."

[3] See ICAO LC/Working Draft No. 579, Penal Offenses Committed on Board Aircraft in Flight and Current National Legislation, *passim.*

State affected may claim jurisdiction according to its own laws. Thus, a State may claim jurisdiction because of such factors as nationality of the offender, nationality of the victim, the fact that the aircraft is one of its registry and the like. Even more serious is the case where, due to the absence of adequate legal rules, or the impossibility of establishing the location of the aircraft at the time of the offense, an aerial offender could go unpunished.

One of the most striking cases of an unpunished aerial offense occurred some eleven years ago. On 2 August 1948, one Cordova assaulted the pilot of an aircraft owned by Flying Tigers, Inc., an American corporation, while the plane was flying over the high seas from San Juan, Puerto Rico to New York. At the same time, he assaulted two other persons on board. Cordova was brought to trial in the United States District Court, Eastern District of New York. There, the judge found him guilty of the acts charged. But he had to arrest judgment of conviction since there was no federal jurisdiction of the United States to punish those acts.[4]

Subsequently, the Congress of the United States enacted a federal statute stating that the federal admiralty criminal statutes applicable to United States vessels on the high seas should also apply to aircraft of United States registry over the high seas.[5] However, as one commentator, Arnold W. Knauth, has pointed out, these maritime texts apply only to a few "crimes of violence" and do not apply to crimes concerning, safety, business and economic crimes, tax crimes, food and drug crimes or many other types of offenses.[6] Therefore, the remedial statute in the United States does not appear to fill the gap entirely.

It is possible that even murder on an aircraft over the high seas could go unpunished. In July 1959, in speaking of proposed amendments to the Canadian Criminal Code, the Honorable Davie Fulton, Minister of Justice, stated that, under Canadian law, it was possible for a murder to be committed on a Canadian aircraft over the high seas and for it to go unpunished in Canada.[7]

Attempts to solve the problem of offenses on board aircraft

As the problem of the exercise of jurisdiction[8] over the person who commits an offense on board an aircraft is a fascinating one, it has given rise to much speculative legal activity. Thus, as early as 1922 and 1924, the International Law Association adopted a series of principles on this subject.[9] Since that time many other non-governmental international organizations and individual writers have put forward draft conventions and sets of principles concerning offenses committed on board aircraft. No less than eighteen such documents are listed in a paper recently published by the International Civil Aviation Organization,[10] and these are only examples taken from a lengthy list. Although none of these sets of principles has yet been applied internationally, they have not been ignored, since they were placed before the ICAO Legal Committee which drew up, at Munich, in August-September

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[4] Avi. 17,311; 1950 U.S. Av. R. 10.

[5] Crimes of Violence over the High Seas in American Aircraft: Public Law 82-514; Title 18 U.S. Code 7; 1952 U.S. Can. Av. R. 437.

[6] See *op. cit.*, note 1 *supra*, 11.

[7] The Montreal Star, Thursday, July 2, 1959, 31, cols. 7-8.

[8] The term "jurisdiction" may be defined, for purposes of this discussion, as "The power of a Court or Judge to entertain an action, petition or other proceeding." (Osborn, The Concise Law Dictionary, Fourth Edition, London, 1954, 187.)

[9] For the text of these principles see ICAO LC/Working Draft No. 582, Texts and Drafts of International Conventions Relating to the Legal Status of Aircraft, 41-42.

[10] See *op. cit.*, note 8 *supra*.

1959, a draft convention on offenses and certain other acts on board aircraft.[11]

That the subject under discussion has been considered by ICAO is due, in part, to requests and recommendations for its study made by such bodies as the International Criminal Police Organization, the International Federation of Airline Pilots' Associations, the International Law Association and the International Commission for Penal Law.

Bearing in mind this outline of the problems to be solved and the brief history of attempts to solve them, one may now consider the position taken by the ICAO Legal Committee in relation to the need for a draft convention and then touch upon the more important features of the particular draft convention recently prepared at Munich.

Need for a convention

In assessing the need for a convention, the Legal Committee noted, *inter alia*, the lack of an international rule concerning extra-territorial jurisdiction of a State in regard to offenses committed on aircraft of its nationality engaged in international air navigation. On the other hand, it may be observed that since the courts of some States are competent to judge, under certain conditions, crimes and offenses committed abroad, it can happen that, in the case of a crime committed on board an aircraft, several States may want to prosecute the offender and this could give rise to problems of conflicts of criminal jurisdiction.[12] The Committee also considered the need to define the powers of the aircraft commander to take necessary measures in respect of acts on board endangering the safety of flight and for the preservation of order over the community on board. This community has increased significantly now that aircraft of larger types have been put into service. When the speeds of the new jets are multiplied by passenger-carrying capacities of up to 170, and weekly movements up to five flights in both directions across the North Atlantic, for example, the largest of these aircraft are seen to generate as much passenger-mileage a year as a 40,000-ton ocean liner.[13] These and other considerations constitute good and sufficient reasons for the formulation of appropriate rules.

To to the form which these rules should take, the Committee rejected as being inadequate a suggestion that, for the solution of the problems under discussion, it might only formulate a statement of principles to be recommended for adoption in national legislations.

Objectives and main features of the draft convention

As already indicated, there is a gap in respect of jurisdiction governing offenses committed on board aircraft engaged in international air navigation. An important objective of the Munich draft is to fill this gap. Some States have enacted laws with extra-territorial application, enabling their authorities to exercise jurisdiction over offenses committed on board aircraft of their nationality, for example, while over the high seas;[14] but there are others which have not yet done so. While States are always at liberty to enact such extra-territorial laws, and do not need the authority of a convention so to act, the idea behind the Munich draft is that a statement of an internationally agreed principle in the matter would serve a useful purpose. This statement would be to the effect that "the State of registration of the

[11] ICAO Doc. 8014 LC/144.

[12] For a discussion of this point, see ICAO LC/Working Draft No. 579, note 2 *supra*, 1-3.

[13] Civil Aviation in 1958, Extract from the Annual Report of the Council to the Assembly, *ICAO Bulletin*, Vol. XIV, No. 4—1959, 51.

[14] E.g., Canada and the United States.

aircraft is competent to exercise jurisdiction over offenses committed on board the aircraft." What would be the result of the adoption of this principle? In some States whose laws do not now apply with extra-territorial effect over such offenses, ratification of the convention may result in incorporation of the above-quoted rule of the convention in their national laws which, thereby, would become applicable to those offenses. This would be the case for States where an international convention, having been duly accepted in accordance with its constitutional processes, becomes, so to speak, the law of the land. There are, of course, other States where legislative measures would be necessary, under their constitutional procedures, if they wished to make their laws applicable with extra-territorial effect over offenses committed on aircraft of their nationality.

That a provision purporting to give a State extra-territorial jurisdiction over offenses on board aircraft must be carefully drawn is illustrated by the following example. Section 62(1) of the United Kingdon Civil Aviation Act, 1949[15] provides that:

> "Any offense whatever committed on board a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

At first glance, this looks like an all-embracing provision. But when it was tested in the case of *Regina v. Martin and others*[16] before Devlin, J., in the Central Criminal Court, London, it was found to be deficient. In this case, three English airmen were indicted in England for unauthorized possession of raw opium in a British-registered aircraft on a flight from Bahrein to Singapore. The prosecutor had alleged violation of the United Kingdom Dangerous Drugs Act, 1951[17] and Dangerous Drugs Regulations, 1953, Regulation 3, and alleged jurisdiction under Section 62 of the United Kingdom Civil Aviation Act, 1949. Devlin, J. reasoned that, while the Dangerous Drugs Regulations, 1953 created an offense *in* England, the particular regulation concerned which created the offense did not apply to acts done on British aircraft *outside* England. In other words, to quote the judgment:

> ". . . section 62 does not apply to a statutory offense which by the terms of the statute that creates it is local and not universal in character."[18]

and again

> ". . . this is not an offense committed on a British aircraft, because the regulation creating the offense does not apply to acts done on British aircraft outside England."[19]

Thus, it may be said that the statutory offenses of British law do not have effect in British aircraft outside Great Britain unless it is specifically so enacted.

Besides filling the gap there would otherwise be no jurisdiction over offenses, the Munich draft convention is also intended to avoid the conflicts of criminal jurisdiction that can arise, even where jurisdiction exists, due to the nature of international operations of aircraft. Although this problem is not peculiar to air transport, some of its aspects acquire special importance

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[15] 12 & 13 Geo. 6, c. 67.

[16] 1956 U.S. & C. Av. R. 141.

[17] An example of a universal offense would be theft which "in the eyes of the law may be an offense wherever it is done." (Devlin, J., in *Regina vs. Martin and others*, 1956 U.S. & C. Av. R. 152.

[18] 1956 U.S. & C. Av. R. 153.

[19] *Idem.*

in view of the characteristics of air transport (e.g., an aircraft may traverse several jurisdictions within a short space of time and it may land in States having no particular connection with the offense. At the same time—although these considerations are not peculiar to air transport—many States may have points of contact with the suspected offender and may wish to take jurisdiction over him. Examples of these points of contact are:

(a) the national interest in the prosecution of certain offenses, in particular, offenses capable of affecting national security, national defense, etc.;
(b) the place where the offense produces an effect;
(c) the nationality of the author of the offense;
(d) the nationality of the victim; and
(e) the fact that the offense had been committed abroad at a place where there is a link with the State which seeks to prosecute, for example, when the offense has been committed on board an aircraft registered in,[20] or landing in, that State.

During the development of the draft convention in ICAO various proposals were considered for the solution of the conflicts of criminal jurisdiction. Among those rejected was one whereby the convention would establish exclusive jurisdiction in one or other of the various States which might be concerned with an offense committed on an aircraft engaged in international air navigation, it having been suggested that the State of registry should be accorded sole jurisdiction under some circumstances, while the subjacent State would have jurisdiction under other circumstances. Also rejected was a proposal to accord international recognition to the jurisdiction of certain States which might be concerned and to establish a system of priorities amongst them.

Munich draft convention on offenses and certain other acts on board aircraft

The Munich draft, which follows neither a system of exclusive jurisdiction, nor one of priorities, may now be examined in detail.

Scope of the draft convention

The draft convention prepared by the ICAO Legal Committee at Munich is confined to a treatment of problems relating to penal offenses and certain acts prejudicial to the safety of air navigation or to good order and discipline when committed on board aircraft; it does not deal with incidents on aircraft giving rise to problems of civil law, e.g., contracts, torts, marriages, births and deaths. The Munich draft also specifies the powers of the aircraft commander which enable him to deal with problems arising in respect of the offenses and dangerous acts on board the aircraft.

The proposed convention will apply in respect of offenses and other acts therein described when committed or done by a person on board any civil aircraft registered in a Contracting State, while that aircraft is: (a) in flight in the airspace of a State other than the State of registration; or (b) in flight between two points of which at least one is outside the State of registration; or (c) in flight in the airspace of the State of registration if a subsequent landing is made in another Contracting State with the said person still on board; or (d) on the surface of the high seas or any other

[20] In regard to this point, the contact based on the registration of the aircraft in a certain State is not due to the fact that the aircraft is considered to be part of the territory of that State, but it is rather the result of a special legislation which, for reasons of convenience, attaches certain legal consequences to the fact that the offense has been committed on board an aircraft.

area outside the territory of any State.[21] One of the effects of this provision would be to exclude from the application of the convention a crime committed on board an aircraft of Italian registration while flying over the high seas between two points in Italy. Thus the draft does not take care of the Cordova-type case.

States having penal jurisdiction

The draft convention contains a uniform rule whereby the State of registration of an aircraft has jurisdiction over offenses committed on board such aircraft. This rule is, however, without prejudice to other grounds or bases of criminal jurisdiction, e.g., the jurisdiction of the State in whose territory the aircraft was at the time of the offense, or that of the State of which the offender or the victim is a national, or that of the State whose national security is affected by the offense, and perhaps some others. The rule appears in paragraph 1 of Article 3 of the draft convention and reads as follows:

> "Independently of any other applicable jurisdiction, the State of registration of the aircraft is competent to exercise jurisdiction over offenses committed on board the aircraft."

It is important to remember that this rule does not affect the entitlement of the State to refrain from actually exercising its jurisdiction in any given case.

Conflicts of jurisdiction

The possibility that more than one State may have and claim jurisdiction over a given offense raises problems of conflicts of criminal jurisdiction. The Committee decided that, except in the single instance of the State overflown without landing, which I shall discuss shortly, a satisfactory solution to such problems of conflict did not appear possible except under a system of priority in regard to jurisdictional claims, combined with an extensive net-work of extradition arrangements; and it further considered that such problems of conflict are not a special characteristic of air navigation and might well be left to be solved under any general system relating to conflicts of criminal jurisdiction that might possibly be evolved in the future.

By way of exception, then, the Munich draft provides, in effect, that in the case where a foreign aircraft merely overflies a given State, without landing therein, such State should be prepared, in the general interest of international air navigation, to forego its jurisdiction in relation to offenses committed on board the aircraft during such overflight, except in certain cases where it could be important for that State to exercise jurisdiction. This principle is in line with that contained in Article 19, paragraph 1 of the Convention on the Territorial Sea and the Contiguous Zone formulated at Geneva on 29 April 1958 concerning the restrictions on the criminal jurisdiction of the coastal State in relation to offenses on board a foreign ship passing through the territorial sea of that State. The principle, as formulated by the Committee and the exceptions thereto appear in paragraph 2 of Article 3 of the draft convention which reads as follows:

> "The criminal jurisdiction of a State in whose airspace the offense was committed, if such State is not the State of registration of the aircraft or the State where the aircraft lands, shall not be exercised in connection with any offense committed on an aircraft in flight, except in the following cases:
>
> (a) if the offense has effect on the territory of such State;
>
> (b) if the offense has been committed by or against a national of such State;

[21] Article 1, paragraph 1.

(c) if the offense is against the national security of such State;
(d) if the offense consists of a branch of any rules and regulations relating to the flight and maneuver of aircraft in force in such State;
(e) if the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under an international agreement."

It is observed that the definition of the period during which the territorial jurisdiction of a State would be limited in the manner specified in paragraph 2 of Article 3 is achieved by the use of the expression "aircraft in flight." This expression is defined in paragraph 2 of Article 1 to mean the period from the moment power is applied for the purpose of actual take-off until the moment the landing run ends. In this manner, the territorial jurisdiction of the State is not affected in the case of any offense committed on a foreign aircraft while the aircraft is at rest or is moving on the ground for taxiing or for any other purpose than for actual take-off. (The application of the Convention in relation to the powers of the aircraft commander, however, pertains to a longer period, as will be explained later.) Since the expression "in flight" is not used in paragraph 1 of Article 3, the rule therein stated as to the competence of the State of registration of the aircraft is not restricted to the "in-flight" period; nevertheless, the application of the whole of the Convention is excluded in respect of jurisdiction of the State of registration whilst the aircraft is either: (a) on the surface of the territory of the State of its registration; or (b) in the airspace of that territory, except when its next landing will be at a place outside that territory (see the provisions of paragraph 1 of Article 1); or (c) over the high seas or any territory not belonging to any State, and subsequently does not land in a Contracting State.

Offenses

It has already been stated that the draft convention applies in the case of offenses on board aircraft. For the purpose of application of those provisions of the Convention which are concerned with penal jurisdiction of a State, offenses are defined[22] as those which are punishable by the penal laws of the Contracting State competent in accordance with Article 3.

An offense or other act on board a State aircraft will be outside the application of the Convention. But the Convention will apply if an aircraft is engaged in transportation for remuneration or hire, whether or not it is owned or operated by a State.[23]

"Ne bis in idem"

The Munich draft contains the principle of *ne bis in idem* in providing that, if a person has been acquitted or, in case of a conviction, has served lawful punishment, in a Contracting State, in respect of an offense, he shall not be prosecuted in another Contracting State unless he is a national of the latter State.[24] While most States would observe this principle, there are variations in the specific terms on the subject in national laws and, therefore, its enunciation in the Convention in specific terms would, it was felt by the Committee, be in the interests of uniformity in application with respect to offenses to which the Convention will apply. Also, while the Convention does not purport to solve questions of conflicts of criminal jurisdiction, the inclusion in the convention of the principle enunciated above would ultimately serve to end conflicts of jurisdiction on the part of all Contracting States once an offender has been finally adjudged in one Contracting State.

[22] Article 2.
[23] Article 1, paragraph 3.
[24] Article 4.

Powers and duties of the aircraft commander

National legislations on powers and duties of the aircraft commander are not uniform and often incomplete.[25] In 1956, the Council of ICAO, having in mind the desirability of the formulation of an international agreement on the subject by the Legal Committee, recommended to Contracting States, as an interim measure, that they consider the adequacy of their laws to enable operators and pilots in command of aircraft to discharge effectively their duties and responsibilities in ensuring the safety of their aircraft and any person or thing on board and preventing any unauthorized act with respect thereto, especially when the aircraft is in foreign territory.

In deciding that the Munich draft should include provisions on the powers and duties of the aircraft commander, the Committee noted that he cannot be expected to have the requisite legal training to judge whether or not an act or omission on board constitutes a penal offense. Therefore, the powers of the aircraft commander in relation to acts on board are so formulated that he need only consider whether such acts are prejudicial to the safety of the aircraft or persons or property therein or to good order and discipline on board. In respect of such acts, the Munich draft gives the aircraft commander the right to impose upon the person concerned measures of restraint as necessary[26] and also to require or authorize a crew member and to request, though not require, any passenger to assist in that behalf. Further, any crew member or passenger is also authorized by the Convention to take reasonable preventive measures, when these are immediately necessary, to protect the safety of the aircraft or persons or property therein.[27] Such powers are exercisable from the time embarkation on board has been completed until disembarkation has commenced, and may also be exercisable, in respect of acts committed on board, in the case of a forced landing outside an airport until competent authorities intervene.[28]

In relation to the powers of the aircraft commander described above and also to his competence in the circumstances described in the next two paragraphs, it should be noted that, while such powers and competence are available to him, he is not required by the Convention to exercise them.

Upon landing, the aircraft commander is entitled to disembark any person who has committed a serious offense on board the aircraft or has committed, or is about to commit, on board the aircraft an act prejudicial to the safety of the aircraft or persons or property on board;[29] and the State of such landing, if it is a Contracting State, is obliged to permit such disembarkation.[30] Such obligation does not impair the competence of that State to deal with the person concerned as it may deem appropriate.

If the aircraft commander has reasonable grounds to believe that a person has committed a serious offense on board the aircraft, he may, when the aircraft lands in a Contracting State, either disembark that person or deliver him to the competent authorities.[31] If the aircraft commander so delivers a person, the obligation of the Contracting State concerned to take that person into custody is qualified. First of all, the State must be satisfied that the circumstances warrant taking the person into custody and, secondly,

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[25] For more details on this subject, see ICAO LC/Working Draft No. 581, Duties and Functions of the Aircraft Commander and the Operating Personnel.

[26] Article 5, paragraph 1.

[27] Article 5, paragraph 2.

[28] Article 5, paragraph 3.

[29] Article 6, paragraph 1. The ICAO Legal Committee could not agree, at Munich, that a definition of the expression "serious offense" was required in the proposed convention.

[30] Article 10, paragraph 1.

[31] Article 6.

it assumes the obligation only if its national regulations and laws so provide.[32]

The aircraft commander is required to transmit to the authorities to whom a suspected offender is delivered by him such evidence and information in relation to the offense as, in accordance with the law of the State of registration of the aircraft, is lawfully in his possession.[33]

The aircraft commander is also required to report to the State of registration any measures of restraint or other action taken by him pursuant to the Convention and also the occurrence of any apparent offense on board.[34] He is required also to notify any Contracting State in which the aircraft lands of an apparent offense or an act prejudicial to the safety of the aircraft or persons or property on board.[35]

Protection of commander or other person

A key provision[36] of the Munich draft ensures the protection of the aircraft commander or other person concerned from liability in any proceedings —it being the intention of the Committee that protection should be afforded in respect of civil or criminal proceedings or any administrative action— in respect of any reasonable restraint or the reasonable performance of other action authorized by the Convention.

Interests of air navigation

The draft convention attempts to balance, on the one hand, the legitimate interests of a State exercising jurisdiction in respect of an offense committed on board an aircraft and, on the other, the interests of regular, efficient and economical operation by aircraft. Accordingly, it provides that in taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offense committed on board an aircraft the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo.[37]

Status of the draft convention

The ICAO Legal Committee, at its Munich session, considered that the draft convention on offenses and certain other acts occurring on board aircraft should be treated as a provisional draft only. The draft has been referred to the ICAO Council with the request that the latter circulate it to Contracting States and interested international organizations for the purpose of obtaining their comments. The Committee considered that, in making such request, the Council should specifically refer to the fact that the Munich draft deals with aspects of criminal law and procedure on which the comments of the States and international organizations would be particularly appreciated.

But even though the work on the draft convention is not yet finished, the new text represents an important step towards the solution of difficult problems arising in the case of crimes and certain acts on board aircraft.

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[32] See Article 10, paragraph 2 (first sentence); for points of detail in regard to the duties of the State having custody, see Article 10, paragraph 2 (second sentence) and paragraph 3.
[33] Article 7.
[34] Article 8, paragraph 1.
[35] Article 8, paragraph 2.
[36] Article 9.
[37] Article 11.

METEOROLOGICAL MEETING, SEPTEMBER 1959

The meeting of the Meteorology Division of the International Civil Aviation Organization and the Commission for Aeronautical Meteorology of the World Meteorological Organization met in Montreal for the purpose of bringing the methods used to supply weather information for aircraft up-to-date and to take into account the special needs of turbo-jet airliners which fly at high altitudes.

The meeting agreed to the simplification and streamlining of existing procedures to make it possible to handle the expanding demands for meteorological information as a result of the continuing increase in air operations. Attention was also paid to the problems of forecasting; among other things, recommendations were made to improve aerodrome forecasts and guidance was given on the accuracy needed for temperature forecasts at aerodromes and at high levels for jet use. Procedures were also agreed upon to allow the use at one end of a route of a forecast issued at the other end, so that the area for which forecasting offices are responsible can be limited and duplication in forecasting reduced.

Following is a brief summary of the recommendations, which must still be approved by bodies of ICAO and WMO:

Preflight information

For long distance flights, there is a pressing need for weather charts used at briefing to cover the weather situation along the route as far as the next aerodrome at which a new briefing would be available. The charts do not have to be produced entirely at the take-off point, but the remote parts may come from another meteorological center in coded form or by facsimile transmission.

In establishing the requirements for preflight information the meteorologists took into account the requirements already established by the ICAO Jet Operations Requirements Panel for the needs of jet aircraft. These requirements include the provision of forecasts for altitudes up to 14,000 meters (45,000 feet), prediction of the altitude of the tropopause, the location and characteristics of the jet streams, the forecasting of hail, turbulence in clear air and in cloud, the location of mountain waves and of regions of aircraft icing and dense upper cloud which could hide the tops of cumulonimbus cloud.

Communications techniques

Member states of ICAO and WMO were invited to pursue or to initiate studies of the use of automatic data transfer techniques (such as teletypewriter or facsimile reproduction) to provide information rapidly to aircraft in flight, and thereby to reduce some of the workload of the pilot and his crew.

Aerodrome weather information

The meeting recognized that there was an operational requirement for the distribution of runway visual range information (visibility along the runway, as seen from an aircraft about to touch down) both to aircraft in flight and to aerodrome and air traffic control units when visibility is low (1,000 meters or 1,100 yards or less). (The observations of runway visual range should be representative for the runway in use.)

As jet aircraft are particularly sensitive to the temperature of the air along the runway on takeoff, there is a need for accurate temperature measurements. In general, the meeting believed that normally there was little difference between temperatures measured within the standard well-

ventilated screen used for meteorological observations and along the runway itself but that, at some aerodromes, this difference could be operationally significant. Local studies are therefore needed, and individual arrangements may be necessary.

Air reporting

The meeting recognized the increasing workload being placed upon the crew in flight, but found that the air to ground reporting of weather conditions in flight was essential, and should not be cut down. These reports are needed by meteorologists as part of their basic data for aviation forecasting purposes; they are also the only source of information on turbulence and icing. Agreement was reached on the frequency of reporting from aircraft in flight. In general, weather information should be reported at about hourly intervals and as far as possible at the same time as position is reported under air traffic service rules. However, routine observations will not be required if the flight duration is two hours or less, or if the aircraft is less than an hour away from its destination. Aircraft flying below 1,5000 meters (5,000 feet) are also exempt, as well as aircraft flying on routes where ground and upper air weather observation networks are considered adequate. Because of the scarcity of upper air observations at high level everywhere in the world, this last exemption does not apply to any aircraft flying above flight level 25 (7,500 meters or 25,000 feet).

More upper air observations

Recognizing the need for supplementing existing upper air observations obtained by radiosonde/radiowind methods and from aircraft in flight, the meeting attached great importance to two projects which are being developed, particularly in the United States. One of them is to obtain upper air observations from merchant ships, and the other is to establish an international network of ground-located tracking stations for constant level balloons. Main obstacle to the first method is the difficulties that arise from the use of hydrogen on board ship; the second method is complicated by the dangers that free balloons present to aircraft in flight. The meeting also noted that spot winds obtained by precise navigational aids (such as the new Doppler radar) are to be preferred to mean winds over a given segment of the route.

II. INTERNATIONAL AIR TRANSPORT ASSOCIATION

DEVELOPMENTS DURING THE LAST 40 YEARS

International cooperation passed a significant milestone this month with the fortieth anniversary of the founding of IATA, the world airline organization.

Six fledgling European companies gathered at the Hague on August 28, 1919 to organize what has since become the International Air Transport Association, currently comprising 90 airlines from all parts of the globe.

The fact that air transport's international organization is thus older than all but a few of its members is an indication that cooperation between airlines to solve international problems is as vital to airline operation as the aircraft itself.

Forty years ago, neither the aircraft, air transport nor IATA itself were impressive. The 1919 airliner was a feeble transport vehicle: it could fly at 85 miles an hour over a 300-mile range and carry 800 pounds of payload. It could only work 300 hours a year and, in the winter season (which then meant six months), it did virtually no flying at all.

Today the fleets of airlines who are members of IATA number more than 3,200 aircraft of all sizes. The largest and newest among them cruise at speeds up to 600 miles per hour, can carry a payload of 40,000 pounds over ranges of 4,500 miles, and can put in 3,000 or more hours work per year.

The year 1919 saw many airlines hatch almost simultaneously out of the egg of World War I aviation development. They started as short scratches on the maps of both hemispheres. Their services grew longer and stronger from 1919 to 1939 and had just begun to span all the major oceans when World War II broke out. Fortified by the fantastic technical development of the war years, they have expanded since 1945 to the point where the airlines bind the world in a comprehensive network of air services connecting thousands of cities on all continents.

With zero as a starting point, statistical measures mean little but some idea of the growth of world air transport can be gained from the fact that the smallest inter-city helicopter operator among IATA's members today carries ten times as many passengers as all the members of IATA did in 1920. And many IATA companies carry as much in a year as all of the members of IATA did in 1938.

The 1919 IATA meeting in the conference room of the Netherlands Ministry of Economic Affairs was called because a few months of international commercial flying had convinced the pioneer airlines that the world was not ready for either the airplane or international enterprise. They found everywhere barriers of differences in language, law, currency, commercial practice, technology and economic regulation. And they found themselves subject to rules originally devised for canal boats and pack trains moving about a slow-paced and highly compartmented world.

They could operate and survive only by combining their forces to bridge these obstacles and IATA was created for that purpose. In the 40 years since, IATA has worked to eliminate these barriers and to weld the individual routes of the airlines into a viable, worldwide system. It has succeeded to the point where a single airline can serve two score countries as a matter of course; one country can be served by the airlines of 50 others; and passengers and goods can fly from anywhere to anywhere on the globe, on a single transport document, paid for in a single currency, and with an infinite variety of possible routings.

The first IATA agreement was recorded on a single sheet of paper; the early IATA meetings were informal gatherings of men who were everything in their own companies. The IATA of today is a much more highly organized structure of committees, conferences and working groups of a wide variety of specialists, whose work is codified in thousands of pages of resolutions and manuals.

Despite this change, IATA remains, as it started, a voluntary association, run on democratic lines, with every airline holding a single vote regardless of its size. When, in 1946 IATA was entrusted by governments with the task of administering the conferences in which the airlines recommend international fares and rates for government approval, the same principles were applied.

While there is very much more to IATA than these conferences, their annual output of hundreds of resolutions and tables of 50,000 and more fares and rates, all of which must be confirmed by governments, makes them one of the world's most effective agencies for the mass production of effective international agreement.

Looking back at this process 10 years ago, when IATA celebrated its 30th anniversary with a meeting in The Hague, Sir William P. Hildred, its Director General since 1946, found reasons for this accomplishment which still stand:

"The airlines have been able to do all this only because they have erected in IATA a pattern of cooperation which extends to the smallest details of operation and to the very ends of the earth. The mechanic at Karachi, the ticket clerk at Auckland, the legal counsel at New York, the accountant in London, the ramp attendant in Prague, the wireless operator at Casablanca and the operations manager at Helsinki are all a part of it. In their work they speak the same language, whether it be words or codes, use the same tickets and baggage checks, follow the same operating procedures and, in all matters, pool the best of their knowledge and experience for the good and the safety of all.

". . . The airlines have created an industry and transformed it into a world utility. It has not been easy to build this structure of international cooperation; great patience and forebearance have been required, and even more than that, an idealism strong enough to withstand the fatigue and disillusion of two great wars. The airlines very early chose the hard road toward this achievement—through the free association of equals, rather than by the domination of a few. But it has been done, the doing of it is IATA's justification . . .

"IATA cannot claim that its problems are unique. Nor would it pretend to the importance of those international organizations which are trying to achieve world peace and agreement in political matters. Nevertheless, as a visible symbol of international achievement, through free association, it is a sign and a promise to men everywhere."

TRAFFIC CONFERENCE AT BURGENSTOCK, SWITZERLAND

The International Air Transport Association held its Spring Traffic Conference at Burgenstock, Switzerland.

The Burgenstock meeting was the first held under a new arrangement of IATA Conference business, whereby procedural and similar matters are handled in a Spring session in order to relieve the workload of the normal annual Fall Conference which deals with policy matters and the levels of international fares and rates.

The Conference adopted some 60 resolutions which dealth with procedures, documents and other non-policy aspects of international airline passenger and cargo traffic agreements.

In Burgenstock particular attention was paid to traffic handling processes in order to speed passengers and cargo through arrival and departure formalities at airports.

Consideration was also given to standardization of procedures for passengers transferring between air and sea carriers, and to improvements in the form and use of the IATA standard passenger ticket.

ADVANCES IN FACILITATION POLICY

Governments are being urged to simplify their documentary requirements for arriving tourists. It should be kept in mind that acceptable forms should be those which travelers already possess, such as driving licenses, birth certificates, national identity cards and expired passports, to prove identity and country of residence. Special forms are not advocated although they may be easy to obtain.

This arrangement is in fact in existence between a number of neighboring States and efforts are being made to expand the practice by many State Tourist Offices in order to develop tourist travel to their territory.

Selective or sample inspection of baggage and cargo by customs authorities is also being advocated.

In 1957 at their Second Session, the European Civil Aviation Conference adopted a recommendation calling on Member States to consider accepting identity cards or expired passports for visits of short duration. At their Third Session in 1959 a recommendation was adopted calling on Member States to sign a Council of Europe agreement which involved a standard identity card.

The fifth session of the International Civil Aviation Organization's Facilitation Division opens in Rome on December 1st, when a review will be made of a number of proposals to facilitate many aspects of air commerce by IATA representatives and progressive results are expected.

III. UNITED NATIONS

INTER-GOVERNMENTAL MARITIME CONSULTATIVE ORGANIZATION ASSEMBLY

The first session of the Inter-Governmental Maritime Consultative Organization Assembly, which was held in London in January 1959, took steps to organize the Secretariat of the newly created specialized agency and to elect the different bodies provided for in the Convention on the Inter-Governmental Maritime Consultative Organization.

A work program of the Organization for a period of two years was approved and decisions were taken to assume certain responsibilities resulting from several agreements reached prior to the coming into being of IMCO, in particular the International Convention for the Safety of Life at Sea (1948) and the Convention for the Prevention of Pollution of Sea Water (1944). The Session decided also on the acceptance of responsibilities by the new Organization in connection with the International Code of Signals and also with the establishment of a Group of Experts on the Unification of the Maritime Tonnage Measurement.

COMMITTEE OF EXPERTS FOR FURTHER WORK ON TRANSPORT OF DANGEROUS GOODS

The first session of the Committee of Experts for Further Work on Transport of Dangerous Goods was held in March in Geneva. This Committee was constituted to continue the work of a previous committee which completed its work with the publication of its report "Transport of Dangerous Goods—Classification, listing, labeling, shipping documents." The present Committee is likely to become a permanent body for the purpose of keeping up-to-date recommendations for the carriage of dangerous goods. A recommendation to the effect that the Commission should meet every two years, should the need arise, has been submitted to ECOSOC through the Transport and Communications Commission. The Committee added over 300 items to the ECOSOC list of over 600. The case of explosives, however, was left to a future meeting of specialists in this particular field.

IV. INTERNATIONAL LABOR OFFICE

RESUME OF AD HOC CIVIL AVIATION MEETING

The Governing Body, at its 139th Session, decided to convene an Ad Hoc Civil Aviation Meeting and that the meeting should be tripartite in character. Provision for this meeting has been made in the proposed expenditure budget for 1960, as adopted by the Governing Body on March 13, 1959.

The Committee on Industrial Committees may wish to recommend that participation should be on a similar basis to that applying to Industrial

Committees, that is, two Government delegates, two Employers' delegates and two Workers' delegates from each of the participating countries, with the I.L.O. paying the expenses of the Employers' and Workers' delegates only. The budget proposals are based on this assumption.

The Committee on Industrial Committees may also wish to make recommendations to the Governing Body regarding the size of the meeting. The Committee will no doubt consider that the size should be such as to ensure adequate representation of countries operating a fair-sized civil aviation system, with due regard to geographical distribution. The budget estimates were based on the assumption that if 16 countries were invited it would be possible to meet the above criteria.

As to the choice of the countries which should be invited to participate, it is suggested that the most relevant criterion, which is readily available for practically all countries, is passenger-kilometers flown on scheduled services on domestic and international routes by airlines registered in each country. The 16 countries with the most extensive passenger-mileage are the following: Australia, Belgium, Brazil, Canada, Colombia, France, Germany (Federal Republic of), India, Italy, Japan, Mexico, the Netherlands, Sweden (included as the country of the headquarters of the Scandinavian Airlines System, though Denmark or Norway might be included instead if desired by the countries concerned), Switzerland, United Kingdom and the United States of America.

The points for decision regarding the Ad Hoc Civil Aviation Meeting are:

1. The Committee on Industrial Committees is invited to recommend that the Governing Body decide that the membership of the Ad Hoc Civil Aviation Meeting should be on the basis of two Government delegates, two Employers' delegates and two Workers' delegates from each participating country, the I.L.O. paying the expenses of the Employers' and Workers' delegates only.

2. The Committee on Industrial Committees is invited to recommend to the Governing Body that 16 member States be invited to be represented at the Ad Hoc Civil Aviation Meeting.

3. The Committee on Industrial Committees is invited to make recommendations to the Governing Body regarding the States Members which should be invited to participate in the Ad Hoc Civil Aviation Meeting.

V. INTERNATIONAL CHAMBER OF COMMERCE

DISCUSSION OF AIR TRANSPORT AS A MEANS OF ECONOMIC DEVELOPMENT

At the 17th Congress time was devoted to Air Transport as a means of Economic Development under the Honorary Chairmanship of Mr. John Berry (South Africa), Chairman, South African National Committee of the ICC, Managing Director, African Cables Ltd.; the Chairmanship of Mr. L. H. Slotemaker (Netherlands), Executive Vice President KLM Royal Dutch Airlines; and Co-Chairmanship of Alvar Lindengrona (Sweden) President, Thulebolagen on the 22nd of April, 1959. The following is an excerpt of the discussion:

Liberalization of Air Transport

The introduction of jet aircraft made the regulations imposed on air transport even more troublesome and thereby the ICC's efforts in favor of liberalization and facilitation of air transport even more indispensable. This was the burden of the opening remarks of the Chairman of the meeting, Mr. Slotemaker.

Mr. E. Weld, Assistant Secretary General, International Civil Aviation Organization (ICAO), informed the delegates of the interesting achievements of the European Civil Aviation Conference on the technical plane (for instance, cooperation by airlines for the training of flight personnel) and on that of the reduction of formalities (which are more simple in Europe than anywhere else), and concerning economic questions.

In the matter of commercial rights for scheduled services, emphasis had passed from attempts to reach a multilateral agreement to a planned continuous program to be conducted by a newly appointed Committee on coordination and liberalization. Meanwhile, complete freedom of carriage for freight between all traffic stops in Europe was advocated.

As regards non-scheduled services a multilateral agreement had been signed by virtually all ECAC States implementing the partial freedom already conferred by the Chicago Convention, by abolishing or strictly limiting the regulations, conditions and limitations that that Convention otherwise permits to be imposed. The European Conference achievements were moderate but ICAO regarded it as a laboratory for the rest of the world.

Mr. H. A. Wassenbergh, Deputy Head, Foreign Relations Department, KLM Royal Dutch Airlines, made a strong plea for a general liberalization of air transport. Present government control over civil aviation prevented carriers from assuming responsibility for the conduct of their own business. This was detrimental to the aviation industry and the international traveling public: the public was the victim of the many conflicts between national civil aviation policies. The jet age might accentuate this unsatisfactory situation. The result would be artificial restrictions on travel possibilities and high fares. Civil aviation thus was an additional source of friction between nations instead of an instrument of peace. The ICC had the task of making governments aware of the needs of the international public and by doing so to induce governments to force carriers to assume more responsibility towards the users. This could be achieved by liberalization. ICAO was thinking of convening a worldwide conference concerning commercial rights in the period 1960-62. The ICC ought to support this plan and make governments aware of the position and needs of air transport users.

The point of view of users was expressed by Mr. Bolhuis, Managing Director, N. V. Philips' Gloeilampenfabrieken (Netherlands), who entirely agreed with the former speaker as to the necessity of liberalization to stimulate traffic, and made certain specific propositions. He suggested in particular the creation of special goods tariffs, pointing out that, as well as freight for which speed was essential, there was bound to be an increase in the quantity of freight for which speed was desirable—but only if extra costs of air transport were offset by lower levels of other components of the total costs of transport (packaging, etc.).

He emphasized the need for consultation between carriers and users within the ICC.

In the name of the International Federation of Forwarding Agents Associations, Mr. W. M. Rademacher (Germany), Managing Director, H. Ristelhuebers Nachf. GmbH., wished that European airlines could, on the one hand, be freed from governmental restrictions and, on the other hand, coordinate their efforts to foster "groupage" service, and undertake careful study of sales freight markets in cooperation with IATA agents.

Mr. M. Hymans, President of Air France, believed that the problem was not to know if air transport should be liberalized, but how to achieve its liberalization. In his opinion, it would be by a spontaneous discipline of airline companies. He quoted the example of the excess capacity, in view of the present fare structure, on lines between Europe and South America.

and the absence in Europe of links between certain centers as a result of the pressure of competition on the Atlantic routes, which led to intra-European air services being organized to serve as feeders for the trans-atlantic runs. This discipline, he said, was made even more necessary by the increase in transport capacity created by jet liners: a lowering of costs, and consequently of charges, could be brought about by the acceptance of, for example, the organization by different airlines of common local agencies.

Mr. Danilo Sartogo (Italy), Member of the Board, Alitalia, agreed with the Council of Europe in regretting that discussions on a multilateral agreement had not reached a conclusion. Recalling the work of the OECE and the Sforza Plan, he considered it advisable that an "Atlantic Multilateral Agreement" be studied by airlines and governments.

Facilitation of Air Transport

Speaking in the name of the Institute of Air Transport, Mr. Slotemaker (who was also in the chair of this meeting) emphasized the importance, particularly on the psychological level, of a reduction of passengers' ground time. Formalities were not the only reasons for delays, which were also caused by, for instance, baggage handling, terminal lay-out and the location of aircraft parking stands.

Mr. Moulton, Chief, Facilitation and Joint Financing Branch, International Civil Aviation Organization, gave an account of his organization's activities in favor of the facilitation of air transport. It is encouraging, he said, to note that the satisfactory rules contained in Annex 9 to the Chicago Convention were gradually being applied by governments, and a noticeable upsurge in "facilitation spirit" was to be welcomed during the last few years. The ICAO welcomed the cooperation of the ICC and other international organizations with a view to simplifying formalities, and was making studies in various fields such as the improvement of traffic flow in airports, facilitation, and the creation of free airports and free trade zones. The next meeting of the Facilitation Division was scheduled for Rome next December 1st and the ICC had been invited to attend.

Mr. Kelly (USA), Member of Executive Committee, International Union of Official Travel Organizations, presented the work of his organization. It had requested the United Nations to convene an international conference on "the facilitation of international travel and the removal or reduction of travel barriers." He called attention to a proclamation by President Eisenhower designating 1960 as "Visit the USA Year." The meeting welcomed this proclamation, and ICC National Committees would be happy to consider this invitation.

The Secretary of the Meeting confirmed that the ICC delegation to the United Nations Commission on Transport and Communications would support the IUOTO's resolution which was in line with the efforts of the ICC since 1953 to revive interest for the preparation of a World Conference on Passport and Frontier Formalities.

Mr. F. R. Emery (South Africa), supported by Mr. Wright (Australia), pointed out the inconveniences caused for businessmen attending important meetings such as the ICC Congress, by restrictions on luggage weight, and suggested a free allowance of bona fide documents of 4 to 5 kgs., or alternatively 8 to 10 kgs. of baggage accompanying the passenger which might be paid for at air freight rates rather than as excess baggage. Mr. S. Morton (USA) sugested the establishment of a standard form covering arrival and departure by aircraft, as well as formalities at hotels, enabling travellers to fill them in beforehand; Mr. Moulton replied that such a system was suggested by the ICAO for the embarkation/disembarkation card, but that it

had not yet proved possible to get governments to agree on this: ICC members could press their respective governments to do so.

Concerning the three questions of liberalization, facilitation and passenger service charges, Mr. J. M. Besso (Canada) requested the ICC not only to adopt resolutions but also to continue its active work in these fields.

International Travel and Hotel Facilities

Mr. Peter Grimm (USA), President and Director, International Hotels Corporation, speaking of the need for added hotel space in most parts of the world, stressed the fact that "on and off season" peaks and valleys in demand were rapidly being levelled off by increased travel the year round, and that new and outstanding hotel facilities created new business for all. He described the most suitable type of hotel for the international traveller, who in the jet age demanded certain standards of comfort and hygiene. The complete costs of building such international hotels nowadays would work out at over $20,000 a room, so Mr. Grimm suggested that some facilities might be offered by governments in the form of long-term loans and guarantees, relief from import duties, and, at least for some years, from taxes. "The hotel must become an integral part of the community in which it stands."

Miss C. Dagna (Italy) also spoke of the need to increase facilities for tourists as a means of encouraging air transport and suggested that the ICC might set up a body or a special Commission to coordinate all the suggestions made about improving facilities for the expansion of the tourist industry. The President said that this proposition would be examined with interest by the ICC Council.

DIGEST OF RECENT CASES

AIRPLANE PASSENGER — DAMAGE TO HEARING AND SPEECH — FEDERAL TORT CLAIMS ACT

Pignataro v. United States

6 CCH Aviation Law Rep. 17,356 (E.D. N.Y. April 9, 1959)

A fourteen-month-old infant lost his hearing and has his speech impaired as a result of a flight upon a United States Air Force plane from Saudi-Arabia to Eritrea. Plaintiff sued under the Federal Tort Claims Act, alleging negligence in flying at high altitudes in an unpressurized plane. The court held that the Federal Tort Claims Act cannot be used to bring an action against the government where the claim arises in a foreign country.

AIRCRAFT COLLISION — PASSENGER — EVIDENCE — DAMAGES

Ratner v. Arrington

6 CCH Aviation Law Rep. 17,357 (Fla. April 9, 1959)

Plaintiff passenger brought a damage action for an injury incurred in a collision between a private aircraft in which he was riding and another aircraft. Defendant objected to testimony by a Civil Aeronautics Administration investigator with regard to the plane's landing approach patterns, under sec. 701 of the Civil Aeronautics Act of 1938 which prohibits the introduction into evidence of investigators' reports. The court sustained the admissibility of such testimony construing sec. 701 to mean that only evidence of opinions and conclusions as to possible causes of accidents is prohibited, not merely statements made to an investigator. On the question of damages, the court found no error in permitting counsel to present a chart showing pain and suffering and loss of earning capacity on a per-diem basis.

ANTITRUST LAWS — CONCERTED RATE QUOTATIONS BY RAILROADS FOR MITIARY TRAVEL — SUPPLEMENTAL AIR CARRIERS

Aircoach Transport Association v. Atchison, Topeka & S. F. Ry. Co.

6 CCH Aviation Law Rep. 17,397 (U.S.C.A. D.C. Cir. Feb. 24, 1959)

Plaintiff supplemental air carriers brought an action against defendant railroads seeking treble damages and injunctive relief in connection with the railroads' practice of transporting military personnel at reduced rates. The trial court had initially granted such relief to the air carriers on the ground that such concerted rate quotations made under the Interstate Commerce Act were in violation of the antitrust laws. On appeal, the trial court's injunction was dissolved and the case remanded because the trial court should have retained its jurisdiction and withheld its decision on the interpretation of the Interstate Commerce Act and existing agreements approved under that Act, until the Commission had passed on the question of whether the railroads could be relieved from the operation of the antitrust laws, and if so, whether they had been so relieved by any approved agreement, and if so, by which agreements, by what provisions thereof, and as of what date. The appellate court's opinion noted that the railroads' practices constituted price fixing among competing non-connecting carriers and were consequently illegal per se under the Sherman Antitrust Act, unless the antitrust laws were

relieved of their operation by virtue of sec. 5a of the Interstate Commerce Act. Moreover, the issue of the intent and effect of any agreement approved by the Commission must, in a case where such issue is the sole and dominant issue in the case, first be referred to the Commission prior to a court determination of whether such an agreement violates the antitrust laws. Hence, as to that aspect of the case in which it was asserted that the railroads' purpose was to destroy competition by the supplemental air carriers, such issue of the intent and effect of the agreement was the sole or dominant issue. Such being the case, the railroads were granted a motion to submit that issue, along with the other issues previously submitted, to the Interstate Commerce Commission for its determination.

MUNICIPAL AIRPORT — LEASE — NON-EXCLUSIVE GRANT TO LESSEE

Southwest Texas Flying Club, Inc. v. City of Del Rio

6 CCH Aviation Law Rep. 17,412 (Tex. Apr. 8, 1959)

Plaintiff lessee sought in trespass to try title to recover a leasehold estate in a portion of the leased property which was leased by the defendant to a third party, allegedly in violation of the lease agreement. The court held that although the lessee secured certain privileges in the operation of the airport, the lessor retained the ultimate control and management. Hence, the ambiguous terms in the lease were construed against the lessee as being a non-exclusive grant, thereby enabling the lessor to lease a portion of the premises to a third party.

AIRCRAFT — SERVICE OF PASSENGER WHILE IN FLIGHT — JURISDICTION

Grace v. MacArthur

6 CCH Aviation Law Rep. 17,436 (E.D. Ark. February 16, 1959)

Plaintiff brought an action for damages for breach of contract in Arkansas against the defendant corporation. Process was served upon the president of said corporation aboard a non-stop flight from Memphis to Dallas, said process being delivered at a time when the aircraft was directly over the Eastern District of Arkansas. Defendant filed a motion to quash claiming that he had not been properly served "within the state." The court held that a person moving in interstate commerce in a regular commercial aircraft, flying in the regular navigable airspace above a state, is within the territorial limits of that state. Accordingly, such aircraft passenger is amenable to service of process while on the plane in flight over the territorial limits of the state in which the process is sought to be served.

INSURANCE — AIRCRAFT "ALL RISK GROUND AND FLIGHT" COVERAGE — SUBROGATION

Isley v. Bolling Areo Club, Inc.

6 CCH Aviation Law Rep. 17,460 (D.C. March 3, 1959)

Defendant, a member of plaintiff aviation flying club, damaged a plane belonging to the club in a crash landing. The club's insurance carrier reimbursed the club in part under an "all risk ground and flight" policy. Plaintiff insurer, as the club's subrogee, sought to recover the amount paid to the club, and the club in turn sought recovery for the deductible amount which was provided by the policy. The court held that as between the club and its members, the insurance inured to the benefit of the members as well as to

the club, and that the club had no right against one of its members to recover for damages covered by insurance. Therefore, if the club has no such right, then neither does the insurance company as subrogee of the club. The club, however, was permitted to recover the deductible portion, as this was a part of the damages which was not insured.

MUNICIPAL AIRPORTS — ADJOINING PROPERTY OWNER — LOW FLIGHTS OF AIRCRAFT — NUISANCE

Chronister v. City of Atlanta

6 CCH Aviation Law Rep. 17,448 (Ga. April 24, 1959)

Plaintiff property owner claimed interference with the reasonable use of his property which adjoined defendant's airport, because of continued low flights of aircraft which used said airport. The court, in sustaining a nuisance action, held that even though the regulation and control of flights of aircraft are vested in the federal government, state sovereignty precludes an invasion of the rights of people. Accordingly, an owner of property adjoining a municipal airport has a preferred claim to the airspace over his property to a height of at least seventy-five feet above the buildings.

AIR CARRIERS — RAILWAY LABOR ACT — FOREIGN FLIGHT OPERATIONS

Air Line Stewards Assoc. v. Northwest Airlines, Inc.

6 CCH Aviation Law Rep. 17,467 (U.S.C.A. 8th Cir. May 29, 1959)

Plaintiff seeks to upset an arbitration award that excepted foreign national cabin attendants on foreign flight operations from the scope of a collective bargaining agreement between plaintiff union and defendant air carrier. The court, in affirming the award, held that because the Interstate Commerce Act, which is incorporated into the Railway Labor Act by reference, is limited in its territorial scope to the transportation of persons and property within the United States, so should the Railway Labor Act. Hence, the Railway Labor Act should not apply to flight service attendants or to other crew members of American flag air carriers who engage in services for said carriers between points outside the continental United States and its territories. The desirability of the Act's applying to all employees alike, is considered a problem directed to the Congress, and not to the courts.

WRONGFUL DEATH — AIR FORCE CRASH — CIVILIAN RETAINED BY AIR FORCE — RELEASE FROM LIABILITY — RES IPSA LOQUITUR

Rogow v. United States

6 CCH Aviation Law Rep. 17,474 (S.D. N.Y. May 25, 1959)

Decedent had been retained by the Air Force to make a recruiting film and was killed instantly in the crash of a B-25 bomber at the inception of his undertaking. Decedent was in the actual employ of his film company however, receiving his wages from them and only certain expenses from the Air Force. He had also signed a release absolving the government from liability for its own negligence, but in this wrongful death action, his executors challenge the release as invalid since the decedent was not receiving a gratuity. The court upheld this contention, stated that although the decedent paid nothing for the flight resulting in the crash, he would have nevertheless been paid for any commercial travel which he might have made instead of by government means. On the negligence question, the court held that

because the B-25 is not an experimental plane, the failure of one engine must be attributable to negligence in either operation or maintenance, and hence applied the doctrine of *res ipsa loquitur*.

CONDEMNATION — NAVIGATION EASEMENT — ELEMENTS SUBJECT TO COMPENSATION

Pope v. United States

6 CCH Aviation Law Rep. 17,548 (N.D. Texas May 22, 1959)

Plaintiff property owner claimed various damages as a result of the construction and use of an Air Force base near his property. The court allowed just compensation for the taking of an easement in conducting flights over his property, for the closing up of an access road to his property, for pasture land which has been converted into creek beds due to a straightening of the creek channel, and for erosion which destroyed a well on plaintiff's property. No compensation, however, was allowed for the injurious effects of noise, vibration and fumes from the operation of a test cell by the defendant, because everyone living in the vicinity is subject to it in varying degrees.

AIRPLANE PASSENGER — DAMAGE TO HEARING AND SPEECH — FEDERAL TORT CLAIMS ACT

Pignataro v. United States

6 CCH Aviation Law Rep. 17,356 (E.D. N.Y. April 9, 1959)

A fourteen-month-old infant lost his hearing and has his speech impaired as a result of a flight upon a United States Air Force plane from Saudi-Arabia to Eritrea. Plaintiff sued under the Federal Tort Claims Act, alleging negligence in flying at high altitudes in an unpressurized plane. The court held that the Federal Tort Claims Act cannot be used to bring an action against the government where the claim arises in a foreign country.

AIRCRAFT LANDING ACCIDENT — INSURANCE — COVERAGE ONLY FOR TAXIING

Jackson v. Royal Indemnity Co.

6 CCH Aviation Law Rep. 17,350 (D.C. Mass. April 2, 1959)

Plaintiff private airplane owner held an aircraft insurance policy which excluded coverage for accidents occurring while in flight, and under the definition section, considered landing and taking off as part of the flight. Taxiing however, was covered. The court held that where an insured under such a policy, knowing he has defective brakes, overruns an airstrip and turns over, such accident must be considered a flight or landing loss, even though the speed of the aircraft had dropped to normal taxiing speed at or prior to the actual instant of the impact which caused the turn over.

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